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Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-884

THE RIPON SOCIETY, INC., ET AL.,
*Petitioners,*

v.

NATIONAL REPUBLICAN PARTY AND
REPUBLICAN NATIONAL COMMITTEE,
*Respondents*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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*Respondents*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petitioners, The Ripon Society, Inc., David L. Allison, Robert D. Behn, Howard F. Gillette, Jr., Michael J. Halliwell, Katherine E. Sasseville, Tanya M. Silverman, Robert W. Sweet, George A. Vradenburg and Quincy White, respectfully pray that a writ of certiorari issue to review the *en banc* judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on September 30, 1975.

## OPINIONS BELOW

Copies of the following opinions and judgments entered in this proceeding are included in the appendix hereto, cited as "*App.* ——."

1. The opinion and order of the United States District Court for the District of Columbia, Judge William B. Jones, entered on January 11, 1974. 369 F. Supp. 368. *App. 1, 17.*

2. The opinion and judgment of a division of the Court of Appeals entered and vacated on March 5, 1975, including the opinion for the court by Chief Judge Bazelon and a dissent by Senior Circuit Judge Danaher. —— F.2d —— (D.C. Cir.), Civil Nos 74-1337 and 74-1358 (March 5, 1975) (slip op.). *App. 19, 59, 66, 67.*

3. The *en banc* opinion and judgment of the Court of Appeals, not yet reported, entered on September 30, 1975 (*App. 68, 171*), including the opinion for the court by Circuit Judge McGowan (*App. 69*); concurring opinions by Circiut Judges MacKinnon, Tamm and Wilkey (*App. 108, 109, 127*); a dissent by Senior Circuit Judge Danaher (*App. 159*); and a dissent by Chief Judge Bazelon, which alone adheres to the position taken by a division of the court in the opinion and judgment entered and vacated on March 5, 1975. *App. 148.*

## JURISDICTION

The judgment of the Court of Appeals was entered on September 30, 1975. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether the decisions of the National Republican Party as to the apportionment of delegates to its national convention constitute state or governmental action and, if so, whether or to what extent principles of the political question doctrine counsel against judicial intervention.

2. Whether the allocation of delegates from the states and the District of Columbia to the national convention of the Republican Party is subject to the principles of

the reapportionment decisions and, if so, whether the system of awarding bonus delegates to states producing Republican victories in specified elections, included in the formula for apportionment of delegates to the 1976 Republican National Convention, violates the Equal Protection Clause of the Fourteenth Amendment, the Fifth Amendment and Article II, Section 1 of the Constitution.

3. Whether, although this case is not likely to be adjudicated in time to permit the Republican Party to adopt a new apportionment formula for the 1976 Republican National Convention, the continuing nature of the controversy requires declaratory and injunctive relief with respect to the use of the victory bonus system before the 1976 Republican National Convention adopts the delegate apportionment formula for the 1980 Republican National Convention.

4. Whether The Ripon Society, Inc., in addition to its nine members whose standing as plaintiffs was affirmed by the Court below, has standing to bring this action.

## STATEMENT OF THE CASE

This petition is part of a continuing challenge, now entering its fifth year, to the victory bonus system used by the Republican Party in the allocation of delegates to the 1976 Republican National Convention.

The petitioners, plaintiffs below, referred to herein collectively as "Ripon," are The Ripon Society, a Republican research and policy organization, and nine members of the Society who are qualified Republican voters in California, Illinois, Indiana, Massachusetts,[1] Minnesota, New Jersey, New York, or the District of Columbia.

The respondents are the National Republican Party and the Republican National Committee which has "the

[1] After judgment of the District Court plaintiff Behn changed his residence from Massachusetts to North Carolina. *App. 74 n.8.*

general management of the affairs of the Republican Party in the United States and its territories subject to direction from time to time of the National Convention." [2]

The action was commenced in December 1971. The complaint alleged that the Republican Party's system of apportioning bonus delegates to its national convention to states producing Republican victories results in invidious discrimination against Republicans of different states and regions in violation of the Equal Protection Clause of the Fourteenth Amendment, the Fifth Amendment and Article II, Section 1 of the Constitution of the United States. It sought declaratory and injunctive relief with respect to the victory bonus system and the standards to be used in the apportionment of delegates to the 1976 Republican National Convention. Jurisdiction was invoked under 28 U.S.C. § 1343(3) and (4) and the civil rights statutes, 42 U.S.C. §§ 1983, 1985(2) and (3), and 1988. *Joint Appendix 58a, 70a.*

Prior to the 1972 Republican National Convention the District Court granted plaintiffs partial relief, declaring that the allocation of a uniform number of bonus delegates to states qualifying for them, in the context of a formula which allocates the remaining delegates in proportion to each state's share of the Electoral College vote, violates the Equal Protection Clause, but that a bonus system which rewards states producing Republican victories by allocating a number of delegates reasonably proportionate to the Electoral College vote or the number of Republican votes which produced the victory would have a constitutionally rational basis. 343 F. Supp. 168, 177-78 (D.D.C. 1972). The court also enjoined the Republican Party from adopting a formula for the 1976 Convention which included the proscribed uniform victory bonuses. *Id.* at 178.

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[2] Rule 19 of the Rules adopted at the 1972 Republican National Convention. See Page 151a of the Joint Appendix filed below, cited herein as "*Joint Appendix* ——."

Three days before the 1972 Republican National Convention convened Justice Rehnquist stayed the District Court order. *Republican State Central Committee of Arizona* v. *Ripon Society*, 409 U.S. 1222 (1972).

By a vote of 910 to 434, the 1972 Convention, following the recommendation of the Republican National Committee and the Rules Committee of the Convention, adopted a formula for the apportionment of delegates to the 1976 Convention ("the 1976 Formula") which includes both uniform and proportional victory bonuses.

Thereafter Ripon amended its complaint to challenge the victory bonus system included in the 1976 Formula. The District Court denied a motion to intervene as plaintiff by the Republican State Committee of Pennsylvania on the ground that its interests were adequately represented by Ripon, and again enjoined the use of uniform victory bonuses but upheld the formula in other respects. 369 F. Supp. 368, 376 (D.D.C. 1974), *App. 17-18*. Both sides appealed. On July 31, 1974, after all briefs had been filed, Ripon moved to advance the argument because of the need to secure timely adjudication. The Republican Party did not join in this motion.

On March 5, 1975, Chief Judge Bazelon writing for a majority of a division of the Court of Appeals reaffirmed the court's earlier holdings in *Georgia* v. *National Democratic Party*, 447 F.2d 1271 (D.C. Cir.), *cert. denied*, 404 U.S. 858 (1971) and *Bode* v. *National Democratic Party*, 452 F.2d 1302 (D.C. Cir. 1971), *cert denied*, 404 U.S. 1019 (1972), that the court has jurisdiction and that the case involves state action and is justiciable. *App. 19, 25-34*. He also ruled uniform and proportional victory bonuses unconstitutional *in toto* and would have enjoined their use for the 1976 Convention. *App. 23, 34-55*. The division judgment was vacated and the case set for reargument before the court *en banc*. *App. 67*.

On September 30, 1975, following reargument the Court of Appeals entered its *en banc* opinion and judgment

reversing the judgment of the District Court and remanding with directions to dismiss the complaint. *App. 68, 107, 171.* Without deciding the threshold questions of jurisdiction, state action and justiciability, the *en banc* opinion by Judge McGowan concludes that the Republican Party's right of association under the First Amendment deserves greater protection than the rights of voters in the Presidential nominating process, and that the Equal Protection Clause, assuming it is applicable, "is satisfied if the representational scheme and each of its elements rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals." *App. 101-02.* As summarized below, the result sanctions disparities in convention representation which far exceed the disparities reflected in the Electoral College apportionment.

**The Party's formula for apportioning delegates to the 1976 Republican National Convention**

The text of the rule containing the 1976 Formula is reproduced in the District Court opinion. 369 F. Supp. at 370-71, *App. 4-5 n.3.*

Based on the 1972 election results the 1976 Convention will include a total of 2,242 delegates from the states, the District of Columbia and the territories. *Exhibit A, App. 177-80.*

1,605 delegates, or 72%, are apportioned to the states on the basis of three delegates for each member of the Electoral College. This gives a basic delegation of nine to each of the smallest states which has three members in the Electoral College, and a basic delegation of 135 to the largest, California, with 45 Electoral College members.

295 delegates, or 13%, are apportioned to the states on the basis of *uniform* victory bonuses which award up to nine additional delegates to each state regardless

of size: 4.5 delegates (rounded to 5) to each of the 49 states which cast its Electoral College vote for the 1972 Republican nominee, and one additional delegate (but no more than 4) to each state which in 1972 or thereafter elected a Republican Senator, Governor or a majority of the state's Representatives in the House.

312 delegates, or 14%, are apportioned to the states on the basis of a *proportionate* victory bonus equal to 60% of the Electoral College vote of each of the 49 states carried by the Republican nominee in 1972.

Of the remaining 1%, 14 delegates are allocated to the District of Columbia, 8 to Puerto Rico and 4 each to Guam and the Virgin Islands.

**The disparities that will result from the use of the 1976 Formula at the 1976 Convention**

Statistics in the record confirm that the victory bonuses cause disparities in representation which, measured by population and party vote, vastly exceed the disparities reflected in the Electoral College apportionment.[3] The District Court having decided the case on cross motions for summary judgment, these statistics are undisputed.

The *uniform* victory bonuses which could give each state, regardless of size, up to 9 additional delegates would provide a 100% increase in the basic delegation of each of the six least populous states, but only a 6.7% increase for California's basic delegation of 135 and a 7.3% increase in New York's basic delegation of 123. The *proportionate* victory bonus, equal to 60% of the Electoral College vote of each state qualifying for the bonus, will increase the basic delegation of every state

[3] The record below shows the disparities that will occur at the 1976 Republican National Convention on the basis of the 1972 election results. It does not reflect the results of elections since 1972, which could give up to three additional bonus delegates to any state electing a Republican Governor, Senator or Republican majority to its seats in the House since 1972.

except Massachusetts by 20% to 22%. (*E.g.*, a state with three Electoral College votes and a basic delegation of nine will be entitled to a bonus of 1.8 delegates which, when rounded up to 2, will equal a 22% increase.)

This victory bonus system will result in the following disparities in representation at the 1976 Convention:

50% of the delegates will be apportioned to states which have 45.9% of the Electoral College vote and 38.9% of the population, and cast 38.6% of the Republican Presidential vote in 1972. *Exhibit E, App. 187-88.* The eight most populous states[4] will be alloted 39.1% of the delegates to the 1976 Convention although they have 42.4% of the Electoral College vote and 48.7% of the population, and cast 48.6% of the Republican vote in 1972. *Exhibit F, App. 189.*

A glance at the statistical tables reproduced from the record in the appendix hereto[5] confirms that the disparities in the population and 1972 party vote represented by delegates at the 1976 Convention will vastly exceed the disparity in population represented by members of the Electoral College.

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[4] California, New York, Pennsylvania, Texas, Illinois, Ohio, Michigan and New Jersey.

[5] As noted in the vacated division opinion (*App. 24, 36 n.26*) the record in the District Court did not include schedules comparing the deviations from mean population and party vote represented by delegates from each state and the District of Columbia, or the deviations from mean population in their Electoral College representation. Based on undisputed statistics in the record schedules listing such deviations were prepared and filed below prior to reargument before the Court of Appeals sitting *en banc*, and are included as exhibits in the appendix hereto. Judge Bazelon's dissent comments on the significance of such data. *App. 148 n.2.*

Each exhibit listing deviations from mean lists the states in the same order—in the order of their deviations from mean population in the Electoral College.

Maximum disparities in representation at the 1976 Convention, *Exhibits B and C, App. 181, 183*

| | 1972 vote per delegate | |
|---|---|---|
| District of Columbia | 2,515 | |
| Florida | 28,148 | |
| Ratio | | 11.19 to 1 |

| | Population per delegate | |
|---|---|---|
| Alaska | 17,775 | |
| Massachusetts | 132,306 | |
| Ratio | | 7.44 to 1 |

Maximum disparity in the Electoral College, *Exhibit D, App. 185*

| | Population per E.C. member | |
|---|---|---|
| Alaska | 100,724 | |
| New York | 443,677 | |
| Ratio | | 4.4 to 1 |

Deviations from mean in the representation awarded different states and the District of Columbia at the 1976 Convention and in the Electoral College, *Exhibits G and H, App. 190, 192*

| | In the Electoral College: Population | At the 1976 Convention: Party Vote | At the 1976 Convention: Population |
|---|---|---|---|
| Average deviation | ±22.2% | ± 29.3% | ± 29.3% |
| Largest over-representation | 73.3% | 88.1% | 80.5% |
| Largest under-representation | —17.5% | — 33.2% | — 45.0% |
| Maximum deviation | 90.8% | 121.3% | 125.5% |

Massachusetts, which cast 45% of its vote for the Republican nominee in the 1972 election, was the only state which did not qualify for the Presidential bonuses. Its representation at the 1976 Convention will deviate by —45.0% from mean population and —22.4% from mean party vote, compared to the —7.6% deviation from mean population in its Electoral College representation. *Exhibits G and H, App. 190, 192.*

**The disparities that would result from the use of the 1976 Formula following an election in which the Republican ticket does not carry a number of states.**

To show the effect of the victory bonus system where a number of states do not qualify for the Presidential bonuses, Ripon filed undisputed statistics confirming the disparities that would have resulted had the 1976 Formula been used for the 1972 Convention where the apportionment would have depended on the results of elections from 1968 to 1971, including the 1968 Presidential election in which the Republican nominee carried only 32 states. *Exhibit I, App. 194-97.*

The disparities in population and 1968 party vote represented by delegates at the 1972 Convention would have vastly exceeded the disparities in population represented by members of the Electoral College (*Exhibits H, J and K, App. 192, 198, 200*):

| | In the Electoral College: Population | At the 1972 Convention: Party Vote | At the 1972 Convention: Population |
|---|---|---|---|
| Average deviation | ±22.2% | ± 36.7% | ± 32.3% |
| Largest over-representation | 73.3% | 86.6% | 83.2% |
| Largest under-representation | —17.5% | — 61.0% | — 45.5% |
| Maximum deviation | 90.8% | 147.6% | 128.7% |

There would have been horrendous disparities between states with similar representation in the Electoral College.

California has 45 Electoral College votes, or some 10% more than New York's 41. This results in almost identical deviations from mean population of —17.4% and —17.5%, respectively. *Exhibit H, App. 192.* In 1968 California and New York cast 47.8% and 44.3% of their votes for the Republican Presidential nominee.[6]

[6] For the 1968 election results, see *Joint Appendix 170a.*

The Republican ticket carried only California. Use of the 1976 Formula would have caused the following disparities in representation between California and New York (*Exhibits I, J and K, App. 194, 198, 200*):

| | California | New York | Difference |
|---|---|---|---|
| Number of delegates | 168 | 125 | 30% |
| Deviation from mean population | —18.8% | — 45.5% | 26.7% |
| Deviation from mean party vote | — 32.0% | — 53.8% | 21.8% |

The Electoral College apportionment of 10 votes to Minnesota and 12 votes to Virginia results in deviations from mean population of —0.8% and —2.6%, respectively. *Exhibit H, App. 192.* In 1968 Minnesota and Virginia cast 41.5% and 43.4% of their votes for the Republican ticket, which carried Virginia. Based on the 1976 Formula there would have been the following disparities in representation between Virginia and Minnesota (*Exhibits I, J and K, App. 194, 198, 200*):

| | Virginia | Minnesota | Difference |
|---|---|---|---|
| Number of delegates | 50 | 31 | 61% |
| Deviation from mean population | 7% | —22.8% | 29.8% |
| Deviation from mean party vote | 24.5% | —35.8% | 60.3% |

Even if the uniform victory bonuses had been eliminated from the 1976 Formula, leaving only the proportional victory bonus of 60% of the Electoral College vote for each state which carried for the Republican ticket in 1968, the representation accorded New York would have deviated from the mean by —32.1% in population, a disparity of more than 22 percentage points from the —10.0% population deviation for California, and by —39.6% in party vote, a disparity of more than 17 percentage points from the —22.2% party vote de-

viation for California; and the representation accorded Minnesota would have deviated from the mean by —13.3% in terms of population, a disparity of 18.9% percentage points from the +5.6% population deviation for Virginia, and by —25.4% in terms of party vote, a disparity of 48.8 percentage points from the +23.4% party vote deviation for Virginia. *Exhibits L and M, App. 202, 204.*

Chief Judge Bazelon summarized the disparities documented by the record and concluded that the deviations resulting from the 1976 Formula "are far in excess of the deviations permitted" in reapportionment decisions of this Court. *App. 23-25, 35, 148 n.2.* The *en banc* opinion makes no reference to these disparities other than to state that "[p]laintiffs have repeatedly stressed that particular states and regions are favored under the formula." *App. 105 n.64.*

## REASONS FOR ALLOWANCE OF WRIT

### I. The decision below rules on constitutional issues expressly reserved by this Court in *Cousins* v. *Wigoda*, and leaves the law on delegate apportionment in utter confusion.

This case raises questions on which this Court intimated no view in *Cousins* v. *Wigoda*, 419 U.S. 477 (1975):

> "(1) whether the decisions of a National Political Party in the area of delegate selection constitute state or governmental action, and, if so, whether or to what extent principles of the political question doctrine counsel against judicial intervention. . . .
>
> "(2) whether national political parties are subject to the principles of the reapportionment decisions, or other constitutional restraints, in their methods of delegate selection and allocation. . . ." 419 U.S. at 483-84 n.4.

The highly important questions reserved in *Cousins* and raised by this case are ripe for decision by this

Court. The decision below leaves the law on the applicability of the principles of the reapportionment decisions to delegate apportionment in utter confusion.

In 1968 the Eighth Circuit held that a state political party may select national convention delegates through a malapportioned state convention system. *Irish* v. *Democratic-Farmer-Labor Party of Minnesota*, 399 F.2d 119 (8th Cir.), *aff'g* 287 F. Supp. 794 (D. Minn. 1968); and the District Court for the Northern District of Georgia declined to declare a major party's procedures for selecting delegates to a national convention invalid but "admonished" the Democratic State Committee to consider prospective changes which would afford equal protection. *Smith* v. *State Executive Committee*, 288 F. Supp. 371, 377 (N.D. Ga. 1968). The result in both cases was affected by the imminence of the national convention and the inability to grant prospective relief for that convention. In *Irish* the District Court also noted that it was presented with a ". . . challenge to the middle echelon of . . ." the presidential election process and that "[w]hatever might be done by this court could have little effect on the entire process . . ." because the ". . . court has no control over the National Democratic party. . . ." 287 F. Supp. at 803.

Since 1968, except for the decision below, Federal courts have consistently held that the one man, one vote principles of the reapportionment decisions apply to delegate apportionment to state and national conventions. *Maxey* v. *Washington State Democratic Committee*, 319 F. Supp. 673 (W.D. Wash. 1970); *Doty* v. *Montana State Democratic Central Committee*, 333 F. Supp. 49 (D. Mont. 1971); *Barthelmes* v. *Morris*, 342 F. Supp. 153 (D. Md. 1972) (declining relief because of laches). In *Redfearn* v. *Delaware Republican State Committee*, 502 F.2d 1123 (3rd Cir. 1974), although one Third Circuit judge ruled that malapportionment by a political party to achieve its objectives would be permissible, on

remand the District Court declared that the one man, one vote principle is applicable to state delegate apportionment. 393 F. Supp. 372 (D. Del. 1975). In two 1971 decisions the court below held the one man, one vote principle applicable to national convention apportionment. *Georgia* v. *National Democratic Party* and *Bode* v. *National Democratic Party, supra.* The Second Circuit also held a political committee's nominating procedures for party candidates subject to the one man, one vote principle, affirming the distinction between "internal" party affairs and party nominations. *Seergy* v. *Kings County Republican County Committee*, 459 F. 2d 308 (2nd Cir. 1972).

In applying the principles of the reapportionment decisions to this case the vacated opinion of the division below was therefore consistent with every reported decision by a Federal court since 1968 bearing on delegate apportionment. Adjudication by this Court as to the application of reapportionment principles to a major party's national convention is thus essential to ensure consistency among circuits in decisions involving delegate apportionment.

The only pending case which the court suggests might bear on the resolution of the issues in this case is *Buckley* v. *Valeo*, —— F.2d —— (D.C. Cir. 1975) appeal docketed, 44 U.S.L.W. 3162 (U.S. Sept. 19, 1975) (Nos. 75-436, 75-437), challenging provisions of the Federal Election Campaign Act Amendments of 1974. See *App. 80-81*, and *cf.* the comment in Chief Judge Bazelon's dissent, *App. 158 n.18.* It is clear, however, that the issues raised by this case are of such overriding national importance as to require resolution by this Court irrespective of the disposition of that case.

The voluminous opinions of the lower courts, as well as the complete record and extensive briefing below, give assurance that this case is unusually well prepared for review by this Court.

**II. By sanctioning the Republican Party's victory bonus system the decision below has eviscerated the proportionality mandated by Article II, Section 1 of the Constitution.**

The major fallacy in the decisions below, which permeates the result reached and every step in the court's analysis, stems from a common defect—the failure to grasp and apply the modified proportionality mandated for the Presidential election by Article II, Section 1 of the United States Constitution, which provides that "Each State shall appoint, in such Manner as the Legislature may direct, a number of Electors, equal to the whole Number of Senators and Representatives. . . ."

It is the thesis of Ripon's case and the thrust of the vacated division opinion (*App. 45 and id. at n.46*) that, although the Republican Party may legitimately employ standards which reflect *relative* differences in the party strength of each state and the District of Columbia, the use of a victory bonus system or other delegate apportionment standards which are completely at odds with the proportionality mandated for the Electoral College deprives the citizens of this nation of political rights secured by Article II, Section 1 and the Equal Protection Clause, and that federal courts may intrude in the party's apportionment decisions to the limited extent required to foreclose the use of such standards.

*Wesberry* v. *Sanders*, 376 U.S. 1 (1964) held that the requirement of Article I, Section 2 of the Constitution that representatives be chosen "by the People of the several States" mandates that "as nearly as is practicable one man's vote in a Congressional election is to be worth as much as another's." 376 U.S. at 8-9. Analogous reasoning supports the conclusion that the use of apportionment standards for a national nominating convention which defy the modified proportionality reflected in the Electoral College would deprive the citizens of the several states of political rights secured to the people

of this nation by Article II, Section 1, and defeat another principle solemnly embodied in the Great Compromise upon which our government was founded.

It is an accident of history that the fundamental principles of the reapportionment decisions were developed in cases involving elections within a single state. In several of these cases the proponents of malapportionment tried to use the federal analogy to justify territorial discrimination. *Reynolds* v. *Sims* rejected the "[a]ttempted reliance on the federal analogy . . . [as] little more than an after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements." 377 U.S. 533, 573 (1964). *Gray* v. *Sanders* rejected an attempt to use the Electoral College analogy to justify weighted voting in a party primary within a single state. 372 U.S. 368, 378 (1963).

Now that we have a federal case the Republican Party wants to disregard Article II, Section 1, contending below that the standard for determining whether a delegate apportionment formula meets constitutional requirements is found in the Twelfth Amendment which, in the event of a deadlock in the Electoral College, leaves the election of the President to the House where each state casts one vote. The decision below reaches the same result by sanctioning the use of a victory bonus system which is completely at odds with the proportionality mandated for the Presidential election by Article II, Section 1.

It is important to emphasize that mathematical equality cannot be the objective of delegate apportionment to a national convention. Ripon has never contended otherwise. The Electoral College justifies a limited and measurable disparity in favor of each of the smaller states. The Democratic Party's use of a delegate apportionment formula combining elements of party vote and the Electoral College apportionment was upheld by the court below in *Bode*. 452 F.2d at 1307-10. The Republican

Party clearly has wide discretion to use apportionment standards which have a rational relationship to the possible constituency in each state and the District of Columbia and reflect variations in party strength so long as such standards are not wholly incompatible with the modified proportionality reflected in Article II, Section 1.

In state districting this Court has recognized that apportionment is essentially a political process, and that judicial interest should be at its lowest ebb where a state, within the limits of the population equality standards of the Equal Protection Clause, purports "fairly to allocate political power to the parties in accordance with their voting strength. . . ." *Gaffney* v. *Cummings*, 412 U.S. 735, 754 (1973). The same principles apply with even greater force to national convention apportionment where the constituency to be represented cannot be judicially defined by any one standard. Permitting the party wide discretion as to the choice of elections by which to measure party strength, and as to the weight to be assigned to each element of the formula, will not satisfy any single one man, one vote standard, but will preserve the proportionality mandated by Article II, Section 1 and result in deviations which, when measured by both party vote and population, are no greater than those reflected in the Electoral College apportionment.

The Republican Party asserted below that no "formula is possible which will not produce such inequities" which result from the victory bonus system. *Joint Appendix 228a, 231a.* To demonstrate the fallacy of such a claim, Ripon introduced two sample formulas combining elements of Electoral College apportionment and party vote in recent elections. Both samples result in deviations which, when measured by both population and party vote, do not exceed the deviations reflected in the Electoral College apportionment. *Joint Appendix 303a-316a,* and Ripon's *Memorandum pursuant to Order of March 19, 1975, Schedules 5 and 6.*

The point was *not* to require the Party to use either formula but to show that the Party would have no difficulty structuring a formula which allows for variations in party strength without destroying the proportionality mandated by Article II, Section 1.

**III. The rulings made or reserved by the court below with respect to the threshold questions and the merits clearly conflict in principle with the reapportionment decisions of this Court.**

**A. *State Action.***

The court below reserves decision on the question whether a major party's decision with respect to the apportionment of delegates to a national convention involves state action (*App. 77-81*), withdrawing from its holdings in *Bode* and *Georgia*, where the court had cited decisions of this Court demonstrating that "it makes no difference for purposes of finding state action that the state party acts through a statewide primary, a state party convention, or a state party committee." 447 F.2d at 1275 and *id.* at n.6, citing *United States* v. *Classic*, 313 U.S. 299 (1941) (party primary); *Gray* v. *Sanders*, 372 U.S. 368, 374-75 (1963) (party primary); *Smith* v. *Allwright*, 321 U.S. 649 (1944) (state convention); *Nixon* v. *Condon*, 286 U.S. 73 (1932) (state committee).

As the basis for its uncertainty the opinion below cites the intervening decisions of this Court in *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972) and *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974) and its concern that the "nexus" between the states and the delegate allocation formula is open to question, particularly in light of *Cousins*, where this Court held that an individual state is without power to interfere with the delegate selection procedures of a national convention. *App. 78.*

In relying on *Moose* and *Jackson* the court below failed to note, as Judge Bazelon's dissent points out

(*App. 150-51*), that this Court explicitly distinguished cases where it had "found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State. See, *e.g.*, *Nixon* v. *Condon*, 286 U.S. 73 (1932) (election); *Terry* v. *Adams*, 345 U.S. 461 (1953) (election). . . ." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. at 352. *Nixon* v. *Condon* and *Terry* v. *Adams*, both involved racial discrimination in party primaries. *Terry* found state action in a party's primary even where the primary was not mandated by the state's election laws. 345 U.S. at 469.

The court's reliance on *Cousins*, where this Court expressly reserved the question of state action, is misplaced. The same national interest in the effectiveness of the party's national convention which secures the party's process for resolving delegate seating contests from interference by a single state (*Cousins*) or by a federal court (*O'Brien* v. *Brown*, 409 U.S. 1 (1972)) makes essential limited intervention in the party's decision with respect to delegate apportionment to prevent the use of apportionment standards completely at odds with Article II, Section 1 of the Constitution.

The court below refuses to recognize that Article II, Section 1 is the source of the state action in a party's decision with respect to delegate apportionment, stating only that if Article II, Section 1 has "any force at all beyond its specific commands, it also is confined to the federal government." *App. 77 n.16*. This conflicts with decisions of this Court which make clear that "the appointment and mode of appointment of electors belong exclusively to the states . . .", *McPherson* v. *Blacker*, 146 U.S. 1, 35 (1892); that there "can be no question but that . . . [Article II, Section 1] does grant extensive power to the States to pass laws regulating the selection of [Presidential] electors" and that "these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific

provisions of the Constitution", *Williams* v. *Rhodes*, 393 U.S. 23, 29 (1968); and that a party's adoption of rules governing the selection of its Presidential candidates, at least to the extent of requiring a loyalty oath of its candidates for Presidential elector, "is an exercise of the state's right [under Article II, Section 1] to appoint electors in such manner, subject to possible constitutional limitations, as it may choose." *Ray* v. *Blair*, 343 U.S. 214, 227 (1952).

**B. *Jurisdiction.***

The court below reserved decision on the question of jurisdiction over the subject matter. *App. 81-82 n.26.* There can be no question as to the court's jurisdiction in view of the formulation in *Baker* v. *Carr*, 369 U.S. 186 (1962), which made clear that under 28 U.S.C. § 1343(3), one of the jurisdictional statutes relied on by Ripon, Congress has assigned jurisdiction over equal protection claims by voters to the District Courts, citing an "unbroken line of our precedents" which sustain "the federal courts' jurisdiction of the subject matter of federal constitutional claims of this nature." 369 U.S. at 201.

This case also involves voting rights. The individual plaintiffs include qualified voters from the District of Columbia and seven states, all but one of which (Minnesota) require or permit a party primary in connection with its Presidential selection process in 1976. Every state has chosen to select its Presidential electors by popular election. *See, McPherson* v. *Blacker, supra.* Eighteen states and the District of Columbia mandate primary elections for the selection of delegates to national conventions. Twenty states provide the major parties with the option of choosing either a primary or convention to select their delegates.[7] The right to vote in

[7] *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1153-54 (1975).

a direct primary "is protected just as is the right to vote at the election. . . ." *United States* v. *Classic*, 313 U.S. at 318. Participation by voters in the Presidential election process will be rendered meaningless if the party is permitted to apportion delegates to its national convention on the basis of standards bearing absolutely no relationship to the Electoral College apportionment which determines the weight of their vote in the general election.

### C. *Justiciability.*

The contradiction between the decision below and the principles of the reapportionment cases is nowhere more apparent than in the court's conclusion with respect to the justiciability of the issues presented by this case, and its conclusion that the party's apportionment of a national convention will meet the requirements of the Equal Protection Clause if "the representational scheme and each of its elements rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals." *App. 101-02.*

By sanctioning the victory bonus system the decision below permits unrestrained territorial discrimination vastly in excess of the disparities reflected in the Electoral College apportionment. As such it is completely at odds with the theme of equality in this Court's reapportionment decisions, which hold that restrictions on the right to vote "strike at the heart of representative government," and that "the right of sufferage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds* v. *Sims*, 377 U.S. at 555. This Court has consistently applied the theme of equality to the selection of Presidential electors within a single state, holding that there is no invidious discrimination if the electors "are elected in districts where each citizen has an equal right to vote. . . ." (*McPherson* v. *Blacker*, 146 U.S. at 40) and that a state

may not structure its nominating petition requirements for independent candidates for Presidential elector so as to discriminate against more populous regions of the state. *Moore* v. *Ogilvie*, 394 U.S. 814, 819 (1969). The vacated division opinion's analysis is fully consistent with this root principle of the reapportionment cases. *App. 41-55.*

The decision below concedes that *Gray* v. *Sanders*, is "clearly the Supreme Court case most closely in point," and that there is "no persuasive distinction" between a primary and nominating convention, at least where the "convention delegates are bound by primary votes," or between "nominations at the state rather than the national level." *App. 106 n.65.* Nevertheless, it purports to distinguish *Gray* on the basis that the primary in *Gray* involved an election in a one party state and was mandated by a state statute. *Id.* No authority is cited for these distinctions, and they are inconsistent with the principles applied by this Court. Even where the two major parties field candidates, nominating petition requirements for independent candidates for Presidential elector which discriminate against more populous regions of a state will be struck down, *Moore* v. *Ogilvie*, and a political party may not engage in racial discrimination in its primary even where the primary system is not mandated by state statute. *Terry* v. *Adams*, 345 U.S. 461 (1953).

Applying a dual standard to racial and territorial discrimination (*App. 105*) results in a clear conflict with decisions of this Court which have held that territorial discrimination is no less invidious than racial. *Reynolds* v. *Sims*, 377 U.S. at 566; *and see Gray* v. *Sanders*, 372 U.S. at 380. And by making the party's associational rights paramount to those of the electorate, the court below has given the party a license to engage in territorial discrimination which this Court has denied to a state legislature and even to the majority of a state's

electorate. *Reynolds* v. *Sims*, 377 U.S. at 561-63; *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 736 (1964); *Kramer* v. *Union Free School District*, 395 U.S. 621, 627 (1969).

The decision below seems to equate the "manageable standard" test of justiciability with the need to impose strict equality on some one man, one vote standard. *App. 83-84.* It is obvious that the rigor of the rules established for congressional and state districting is wholly inappropriate here, where the fairness of an apportionment cannot be tested by adherence to any single standard. It is equally obvious that, subject to the addition of two votes for each state's Senators, the Electoral College assures the electorate of each state a proportionate voice in the general election; that the greater importance of the smaller states is measurable; and that a court would have no difficulty in making the determination that the victory bonus system, or other standards which are completely at odds with the modified proportionality reflected in the Electoral College, results, following this Court's formulation on justiciability in *Baker* v. *Carr*, in "a discrimination [that] reflects *no* policy, but simply arbitrary and capricious action." 369 U.S. at 226.

**D. *The Merits.***

Having in effect relieved itself from the need to apply any standard, the court below merely considered whether the victory bonus system "rationally advance[s] some legitimate interest of the party in winning elections or otherwise achieving its political goals." *App. 101-02.* The justifications given for finding such rationality are contradicted by both reason and history.

The court below states that the victory bonus system "has the effect of making delegate apportionment more reflective of party strength than it would be if based on electoral college vote alone." *App. 92 n.42.* The District Court had no difficulty ruling, and did so twice, that

uniform victory bonuses which increase the basic delegation of any of the least populous states by 100%, but increase California's delegation by only 6.7%, are not a rational means of promoting party strength. *App. 12.* Nor is the proportional victory bonus, which increases the basic delegation of qualifying states by 20%, reflective of party strength because there is no correlation between the bonus and the percentage vote by which party candidates win or lose, and no correlation between victory in one election and the next. The most superficial examination of recent elections will reveal that there is simply no substance to the statement that "[a] state which has gone Republican in the past may do so again." *App. 103.*

Of the 26 states carried by the Republican nominee in 1960, only one was carried in 1964.[8] Of the 6 states carried by the Republican nominee in 1964, only 2 were carried in 1968. Of the 44 states which were not carried by the Republican nominee in 1964, only 14 were not carried in 1968. Of the states which carried for the Republican nominee in 1968, all did so again in 1972, but so did all but one of the 18 states which did not carry for the Republican nominee in 1968.

The court below ignores history when it states that it is unable to conclude that treating states on a uniform basis does not rationally serve the cause of cohesiveness among the state parties because "it took precisely such a scheme to bring about the union of the states themselves." *App. 105.* As this Court has made clear, the issue between the proponents of proportional representation and the proponents of uniform treatment of the states percipitated the most bitter controversy of the Constitutional Convention, and was resolved only by the

[8] For the Electoral College vote cast in elections from 1960 to 1968, see NOMINATION AND ELECTION OF THE PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES 7 (Government Printing Office 1972).

Great Compromise which assured representation in proportion to population except in the Senate and the Electoral College, where limited deviations in favor of smaller states resulted in limited variations from strict proportionality. *Wesberry* v. *Sanders*, 376 U.S. at 10. It is inconceivable that such limited variations from strict proportionality can be equated with uniform treatment of the states. Nor is it relevant that the Twelfth Amendment awards each state an equal vote, because its procedures come into play only in the event of a deadlock in the Electoral College.

The enormity of the error in sanctioning any apportionment purporting to serve the Party's interests is apparent in the disproportionate allocation of delegates to the District of Columbia. By failing to address the reasons set forth in the record for that allocation, the court below has given tacit sanction to the justifications advanced by the Party for the disproportionate allocation, which include the "special burdens imposed by virtue of being a protest site . . ." and "large financial contributions to the Party." *Joint Appendix 292a.* If such reasons justify malapportionment for one jurisdiction, nothing would prevent their use by the Party for the nation at large, with consequences which would be destructive of liberty and order in this nation.

**IV. Even if the timing forecloses relief for the 1976 Convention, the continuing controversy makes declaratory and injunctive relief essential.**

From the inception of this case in 1971 Ripon has sought declaratory and injunctive relief with respect to the use of the victory bonus system in the 1976 Formula. If that formula had been finally adjudicated unconstitutional before October 31, 1975, the Republican National Committee would have had authority, under the rules adopted by the 1972 Convention, to effect its revision. Rule 30, Section A.8, *App. 4-5 n.3.* Once the

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call to the 1976 Convention is issued, now scheduled for year-end 1975, it will not be possible to alter the number of delegates from each state. Relief for the 1976 Convention will be foreclosed unless, following remand, the District Court were disposed to impose a system of weighted voting, as the Second Circuit did in *Seergy* v. *Kings County Republican County Committee, supra.*

There is, nevertheless, an urgent need for declaratory and injunctive relief with respect to the party's victory bonus system. This case represents a continuing controversy which is " 'capable of repetition, yet evading review.' " *Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974) (and cases cited). For more than 40 years each Republican National Convention has adopted a delegate apportionment formula for the next convention which included a victory bonus system. The 1976 Convention is likely to do so for 1980. Since the primary responsibility for reapportionment lies with the malapportioned body, declaratory and injunctive relief with respect to the victory bonus system during the current Term is necessary to ensure that the 1976 Convention will have an opportunity to adopt a formula for the 1980 Convention which is consistent with the decision of this Court.

## CONCLUSION

The decision below rejects the root principles of the reapportionment cases and leaves the law on delegate apportionment in utter confusion. The result makes a mockery of representative government.

For the reasons stated in the vacated division opinion by Chief Judge Bazelon and summarized here, Ripon respectfully requests that the Court grant this petition for *certiorari.*

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

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No.

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NATIONAL REPUBLICAN PARTY and
REPUBLICAN NATIONAL COMMITTEE,

*Conditional Cross-Petitioners,*

v.

THE RIPON SOCIETY, INC., *et al.*,

*Respondents.*

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## CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The National Republican Party and the Republican National Committee petition, conditionally, for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above entitled case. The judgment below was favorable to the present cross-petitioners, and they do not seek to change that judgment. This cross-petition is filed only to protect the right of the cross-petitioners to rely on certain defenses and

arguments in support of the judgment below, in the event that the Court grants the petition which has been filed in the case of *Ripon Society v. National Republican Party*, No. 75-884. The present cross-petitioners are opposing that petition, and if that petition is denied, then the present cross-petition should be denied.

## OPINIONS BELOW

The opinion of the District Court is reported in 369 F. Supp. 368. It is set out at pages 1-16 of the Appendix in No. 75-884.

The opinion of a division of the Court of Appeals, and the opinions rendered by the judges of the Court of Appeals sitting *en banc* have not been officially reported. They are included in the Appendix which has been filed in No. 75-884 at pages 19-65, and pages 68-170, respectively.

## JURISDICTION

The judgment of the Court of Appeals was entered on September 30, 1975. It is printed at pages 171-172 of the Appendix filed in No. 75-884. On December 21, 1975, the Chief Justice entered an order extending the period for filing this cross-petition until January 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether a decision by a political party with respect to the apportionment of delegates at a national convention involves state action.

2. Whether the District Court had jurisdiction of this case under 28 U.S.C. 1343(3) or otherwise.

3. Whether the issue presented in this case presents a justiciable question which can properly be decided by a court.

4. Whether the Ripon Society, and the individual petitioners, have the requisite standing to raise the issue presented by the petition.

5. Whether the question presented in the petition is now moot, so that the petition seeks, in effect, an advisory opinion, which is beyond the jurisdiction of the federal courts.

## STATEMENT OF THE CASE

The facts relating to the merits of this case are stated in RNC's opposition to Ripon's petition for certiorari and need not be repeated here. This cross-petition is filed for two purposes:

(1) to preserve the right of the National Republican Party and the Republican National Committee to raise certain issues and questions in support of the judgment below; and

(2) to avoid the necessity of complex and often elusive procedural arguments as to the right of the present cross-petitioners to rely on these questions in the event that certiorari is granted in No. 75-884. See

Stern, "When to Cross-Appeal or Cross-Petition – Certainty or Confusion?", 87 Harv. L. Rev. 763 (1974); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, at 226 n. 2; *International Ladies Garment Workers v. Quality Manufacturing Co.*, 420 U.S. 276 at 280-281 n. 2.

## ARGUMENT

The present cross-petitioners oppose the granting of the writ of certiorari applied for by the Ripon Society and others in No. 75-884, and have filed a Brief in Opposition there. If that petition is denied, this cross-petition should be denied. However, if Ripon's petition is granted, then the present cross-petition should be granted, in order to eliminate any question as to the right of the cross-petitioners to rely, in support of the judgment below, on certain arguments which were presented in the court below. A further question – mootness – has arisen since the decision of the court below.

These several questions may be briefly summarized as follows:

1. *State Action.* In the court below, the petitioners in No. 75-884 contended that the allocation of convention delegates by a national political party constitutes "state action" so as to bring the case within the provisions of the Fourteenth Amendment. The court below discussed this question (App. 77-81 in No. 75-884), but then said: "... we decline to decide it" (at 81) since "it is clear to us that plaintiffs' case must fail on its merits without regard to whether or not

there is state action, a question which we therefore expressly reserve."[1]

Should there be a different view of the merits of the case, the cross-petitioners should be in a position to raise the question of state action. It is not known whether they can, without a cross-petition, rely here on a question in defense of the judgment below which was *not* decided there. If the petition in No. 75-884 is granted, then the granting of this cross-petition will make it possible to present this issue, without having to engage in elaborate discussion of uncertain procedural questions.

2. *Jurisdiction.* In the court below, the cross-petitioners contended that there was no statutory basis for jurisdiction of this case in the District Court. The court below discussed this question in its opinion, Appendix 81-82, n. 26. However, the court below said that it would "assume rather than hold," the question of the interrelation of §1343(3) and state action, as indicated above, and that accordingly "we reserve also the question of jurisdiction under §1343(3)."[2]

3. *Standing.* The court below held that the individual plaintiffs had standing to raise the issues involved in this suit. This question is discussed at App. 72-75. The

[1] Judges Tamm and Robb (App. 109, 113-121, 172) and Judges Wilkey and Danaher (App. 128-135) concluded that there was no "state action." Only Chief Judge Bazelon (App. 150-152) decided that the requisite "state action" was present.

[2] Closely related to the issue of jurisdiction is the question of the capacity of the National Republican Party to be sued, in view of the fact that it has no juristic existence, and is simply a convenient short-hand for a collection of state and territorial Republican Parties. This question is discussed, and resolved, adversely to the contention of the petitioners, at App. 72, n. 5. It is mentioned here so as to preserve the question if certiorari should be granted in these cases.

cross-petitioners will want to rely on this issue if certiorari should be granted in these cases.[3]

The principal plaintiff here is the Ripon Society which, as the court below said, (App. 75) "claims no harm to itself, nor even to any interest to which it is particularly dedicated." Whether the Ripon Society has standing was, said the court below (App. 76), "a question which we need not decide in this case."[4] If certiorari is granted by the Court, this question should be available to the present cross-petitioners.

4. *Justiciability.* The issue of justiciability is at the heart of this case. It is discussed by the court below at App. 82-84, where the court indicated considerable doubt about the appropriateness of the issues here for court decision, that is, about their justiciability. However, in view of its holding on the merits, the court below declined to decide the issue of justiciability.[5]

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[3]The petition should surely be dismissed with respect to the plaintiff Behn, who has moved from Massachusetts, since the judgment of the District Court. See Petition in No. 75-884, p. 3, n. 1. Similarly, as the court below indicated (App. 74-75, n. 8), there is a special question as to the standing of the petitioner Gillette, since he is a resident of the District of Columbia which he claims is over-represented by the convention formula.

[4]Judge Mackinnon (App. 108) and Judge Danaher (App. 159) concluded that the Ripon Society had no standing. Only Chief Judge Bazelon (App. 149) concluded that the Ripon Society did have standing.

[5]Judge Tamm (App. 121-126), Judge Robb (App. 172) and Judges Wilkey and Danaher (App. 127, 135-146, 164-170) concluded that the issues were not justiciable. Only Chief Judge Bazelon concluded that the issues were justiciable. (App. 152-153).

This issue should be preserved if certiorari is granted in these cases.

5. *Mootness.* The issues raised in this case are now moot. The call for the convention has gone out, and it is no longer possible to change the allocation of delegates. Accordingly, the present case should be dismissed.

This fact is acknowledged in the Petition in No. 75-884. See Pet. 25-26. This question is further discussed in the Brief in Opposition. It is presented here only to be sure that it will be available to the cross-petitioners in the event that certiorari is granted in these cases.

## CONCLUSION

The petition for certiorari in No. 75-884 should be denied, for the reasons stated in the Brief in Opposition. If that petition is denied, then the present cross-petition should be denied. In the event that the petition in No. 75-884 is granted, however, the present cross-petition should be granted in order that all issues may be fully presented to the Court, and in order to avoid the necessity of essentially fruitless discussion of procedural questions as to the availability of these issues to the cross-petitioners.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

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No. 75-884

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THE RIPON SOCIETY, INC., ET AL.,
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NATIONAL REPUBLICAN PARTY AND
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*Respondents*

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## APPENDIX

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## APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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No. 2238-71

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RIPON SOCIETY, INC., ET AL.,
*Plaintiffs*

v.

NATIONAL REPUBLICAN PARTY AND
REPUBLICAN NATIONAL COMMITTEE,
*Defendants*

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# OPINION

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(January 11, 1974)

WILLIAM B. JONES, District Judge.

This action has been pending in this Court since the filing of the original complaint on November 8, 1971. That complaint challenged the constitutional validity of the 1972 formula for the apportionment of delegates to the Republican National Convention. On December 3, 1971, the parties stipulated that the complaint would be amended to challenge the formula for apportionment of delegates to the 1976 Republican National Convention, to be adopted at the 1972 Convention. The purpose of the stipulation was to avoid the uncertainty that resulted from the filing of the original complaint and its effect on the 1972 apportionment of delegates to the 1972 Convention. Following the stipulation, the plaintiffs' com-

plaint was amended and thereafter plaintiffs filed a motion for summary judgment. Defendants answered and moved to dismiss the action against the defendant National Republican Party, to quash service and to strike from the pleadings all references to the said defendant. Defendants also moved to dismiss the Ripon Society, Inc., as a plaintiff.

On March 9, 1972, this Court having heard arguments on all the motions, denied the defendant Republican National Committee's motion to dismiss plaintiff Ripon Society, Inc.; denied the motions to dismiss the defendant National Republican Party, to quash service and to strike from the pleadings all references to the latter defendant.

On April 28, 1972, this Court filed its opinion and order granting, in part, plaintiffs' motion for summary judgment and enjoining the defendants from adopting at the 1972 Convention a formula for apportionment of delegates to the 1976 Republican Convention, which would allocate a uniform number of bonus delegates to states qualifying for them, with no relation to the states' electoral college vote, Republican votes cast in certain specified elections, or some combination of these factors. Ripon Society, Inc. v. National Republican Party, 343 F.Supp. 168 (D.D.C. 1972).

When the order was entered by the Court, the defendant Republican National Committee appealed to the United States Court of Appeals for this Circuit from all of the orders granted by this Court. Plaintiffs cross-appealed to the extent that the order granting plaintiffs' motion for summary judgment permitted the adoption at the 1972 Republican Convention of a formula of apportionment of delegates to the 1976 Republican Convention, which would award bonus delegates to states producing Republican victories in specified elections, and which according to plaintiffs did not place any rational

limit on the number of delegates that such formula might apportion to each of the Territories.

On July 14, 1972, this Court denied motions to intervene by several Republican state central committees and by 1 delegate from the State of Wyoming.

On August 16, 1972, Mr. Justice Rehnquist of the Supreme Court of the United States, upon the application by Republican state committees of 13 states and a delegate from Wyoming, stayed the injunctive portion of this Court's order granting plaintiffs' motion for summary judgment "pending the timely prosecution of the appeals to the [Court of Appeals], and the disposition of the appeals by that Court." Republican State Central Committee of Arizona v. Ripon Society, Inc., et al., 409 U.S. 1222, 93 S.Ct. 1475 (1972).

On November 24, 1972, the Court of Appeals dismissed the appeal to that Court on the motion of defendants. On November 29, 1972, the Court of Appeals on motion of the defendants dismissed the remaining cases on appeal and remanded them to this Court with directions to vacate its judgment and at the same time granted leave to the plaintiffs to file a supplemental complaint. Thereafter, on April 13, 1973, this Court entered an order vacating its April 28, 1972, judgment. Plaintiffs have now filed a supplemental complaint challenging the formula adopted by the 1972 Convention for the apportionment of delegates to the 1976 Republican Convention. Plaintiffs have filed a motion for summary judgment and defendants have filed a motion to dismiss, a motion to strike and a motion for summary judgment.[1]

Mr. Justice Rehnquist's stay order was in effect on August 22, 1972, when the Republican National Conven-

[1] The Republican State Committee of Pennsylvania filed a motion to intervene, which motion was denied by this Court.

tion adopted the rules for its 1976 Convention. Rule 30—hereafter referred to as the 1976 formula—was among the rules adopted. According to the affidavit of William C. Cramer, in support of defendants' motions for summary judgment, a subcommittee of the Convention's Temporary Committee on Rules held public hearings and considered 17 proposals for delegate allocation and apportionment to the 1976 Convention.[2] The same affidavit states that, notwithstanding Mr. Justice Rehnquist's stay order, the members of the Rules Committee and the delegates to the 1972 Convention were aware of their duty to draft and adopt a delegate selection formula that "would be constitutionally sound, cognizant of * * * [this Court's] Order of April 28, 1972, and representative of party interests." The 1976 formula (Rule 30)[3] provides

[2] Affiant Cramer was Chairman of both the Temporary and the Permanent Rules Committees. At the time of the 1972 Convention he was not counsel for defendants in this case. He entered his appearance here on February 20, 1973.

[3] Rule No. 30

The membership of the next National Convention shall consist of:

A. Delegates

1. Six (6) Delegates at Large from each of the fifty (50) states.

2. Three (3) District Delegates for each Representative in the United States House of Representatives from each state.

3. Fourteen (14) Delegates at Large for the District of Columbia, four (4) Delegates at Large for Guam, eight (8) Delegates at Large from Puerto Rico, and four (4) Delegates at Large for the Virgin Islands.

4. From each State casting its electoral vote, or a majority thereof, for the Republican Nominee for President in the last preceding election: Four and one-half (4½) Delegates at Large plus the number of the Delegates at Large equal to 60% of the electoral vote from each such State. In addition, one Delegate at Large shall be awarded to a State for any and each of the following public officials elected by such State in the year of the last preceding Presidential election or at any subsequent election held prior to January 1, 1976:

[Footnote continued on page 5]

[3] [Continued]

(a) A Republican United States Senator: Provided, That no such additional Delegate at Large award to any State shall exceed two;

(b) A Republican Governor: Provided, That no such additional Delegate at Large award to any State shall exceed one; or

(c) a Republican membership of at least half of the State's delegation to the United States House of Representatives: Provided, That no such additional Delegate at Large award to any State shall exceed one.

In the computation of the number of Delegates at Large, any sum of the four and one-half (4½) plus the 60% representing a fraction shall be increased to the next whole number.

5. If the District of Columbia casts its electoral vote, or a majority thereof, for the Republican Nominee for President in the last preceding Presidential election: Four and one-half (4½) Delegates at Large, plus the number of Delegates at Large equal to 30% of the fourteen (14) Delegates at Large alloted to the District of Columbia. In the computation of the number of Delegates at Large, any sum of the four and one-half (4½) plus the 30% representing a fraction shall be increased to the next whole number.

6. Any State which would receive fewer Delegates under all provisions of this Rule than it received to the 1972 Republican National Convention shall have its number of Delegates increased to the same number of Delegates it received to the 1972 Republican National Convention.

7. In the event this Rule No. 30 is the subject of litigation and is finally adjudicated in the courts to be invalid, then this Rule No. 30 shall be of no force and effect and the Republican National Committee is hereby authorized to adopt the formula which will determine the membership of the next National Convention. No new formula may be so drawn by the Republican National Committee after October 31, 1975.

8. Should it become the duty of the Republican National Committee to implement Section 7 of Rule 30 in voting in said Committee, the Committee members representing any State, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands shall be entitled to cast the same number of votes as said State, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands were entitled to cast in the 1972 Republican National Convention.

B. Alternate Delegates

One (1) Alternate Delegate to each Delegate to the National Convention.

for the apportionment and allocation of delegates to the 1976 Convention on the basis of the 1972 election returns as follows:

1. The 1976 Republican Convention will comprise a total of 2,242 delegates from the states, the District of Columbia, Puerto Rico, Guam and the Virgin Islands.

2. 1605 delegates, or 72% will be apportioned to the states on the basis of 3 delegates for each of the states' 535 electoral votes; that is, 3 delegates for each state's two United States Senators and 3 delegates for each Representative in the United States House of Representatives from each state.

3. 245 delegates, or 11%, will be allocated on the basis of a uniform bonus of 4.5 delegates (rounded to 5) to each of the 49 states which cast its electoral vote for the 1972 nominee for President.

4. 312 delegates, or 14%, will be apportioned to the states on the basis of 60% of the electoral vote of each of the 49 states which cast its electoral vote for the 1972 Republican nominee for President.

5. 50 delegates, or 2%, will be apportioned to states on the basis of one additional delegate to each state which in November, 1972, or at a subsequent election prior to January 1, 1976, elected a Republican Senator, Governor, or Republicans to at least half of the state's seats in the House of Representatives; but in no event shall there be awarded more than 4 delegates to a state.

6. 16 delegates will be allocated to the District of Columbia, 8 to Puerto Rico, and 4 each to Guam and the Virgin Islands; all of which will constitute 1% of the total delegates to the 1976 Republican Convention.[4]

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[4] For the foregoing breakdown of the number of delegates by categories and the percentages, see the John J. Osborn, Jr. July 31, 1973 affidavit and attached exhibits, all of which have been filed in support of plaintiffs' motion for summary judgment.

Each delegate to the 1976 Republican Convention will be entitled to 1 vote and in the absence of the delegate his or her alternate may cast the vote. Rule 6 of the Rules of 1976 Republican Convention (Exhibit L-1, Osborn July 31, 1973 affidavit).

It is the constitutional validity of the 1976 formula that plaintiffs' supplemental complaint challenges. Plaintiffs claim that the formula violates the Equal Protection Clause of the Fourteenth and Fifth Amendments to the Constitution and results in invidious discrimination between Republicans of different states, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and Republicans of different regions.

I. *Defendants' Motions to Dismiss and to Strike*

Defendants have moved to dismiss the supplemental complaint as well as to strike certain allegations therefrom. The main thrust of defendants' dismissal motion is that this Court lacks jurisdiction over the subject matter on the grounds that there is no state action involved and further that the matter at issue is non-justiciable.

The questions of state action and justiciability were before this Court at the time it entered its April 28, 1972 judgment. This Court cited State of Georgia et al. v. National Democratic Party et al., 145 U.S.App.D.C. 102, 447 F.2d 1271, cert. den., 404 U.S. 858, 92 S.Ct. 109, 30 L.Ed.2d 101 (1971), and Bode et al. v. National Democratic Party et al., 146 U.S.App.D.C. 373, 452 F.2d 1302 (1971), cert. den., 404 U.S. 1019, 92 S.Ct. 684, 30 L.Ed.2d 668 (1972), which held that there was sufficient state action in the selection of delegates to national political conventions and that the apportionment of delegates to such conventions presented a justiciable question. Relying on such authorities this Court recog-

nized it had jurisdiction over the subject matter of plaintiffs' claims then asserted. 343 F.Supp. 168, 173-174.

But defendants would have this Court now reverse its prior conclusion. They assert that such is required by O'Brien v. Brown and Keane v. National Democratic Party, 409 U.S. 1, 92 S.Ct. 2718, 34 L.Ed.2d 1 (1972), decided on July 7, 1972, as well as the opinion of Mr. Justice Rehnquist in Republican Committee v. Ripon Society, 409 U.S. 1222, 93 S.Ct. 1475 (1972), at the time he stayed the effect of this Court's April 28, 1972 order. In his opinion Mr. Justice Rehnquist stated that this Court, at the time it entered its April 28, 1972 order, did not have the benefit of the Supreme Court's opinion in *O'Brien*. This Court has now had an opportunity to consider the *O'Brien* opinion and is not persuaded that the matter there is indistinguishable from the constitutional questions presented in this case.

O'Brien v. Brown and Keane v. National Democratic Party were considered together by the Supreme Court on applications to stay the judgment of the Court of Appeals of the District of Columbia Circuit. Both cases involved the seating of delegates at the 1972 National Democratic Convention. In *Keane* the plaintiffs challenged the recommendation of the Credentials Committee of the Democratic National Convention to unseat 59 uncommitted delegates from Illinois on the ground, among others, that they had been elected in violation of the "slate-making" guideline adopted by the Democratic Party in 1971. The District Court dismissed the complaint and the Court of Appeals rejected the contentions of the unseated delegates that the Committee's action violated their constitutional rights.

In *O'Brien* the Credentials Committee recommended unseating 151 of 271 delegates from California committed by California law to Senator McGovern under that State's

"winner-take-all" primary system. The Committee concluded that that system violated the 1968 Democratic National Convention mandate calling for reform in the party delegate selection process. The complaint challenging the action of the Committee was dismissed by the District Court. The Court of Appeals, however, concluded that the Committee action violated the Constitution.

In granting the stays applied for in *O'Brien* and *Keane*, the majority of the Supreme Court expressly stated that these were not cases "in which claims are made that injury arises from invidious discrimination based on race in a primary contest within a single State." 409 U.S. 4, n. 1, 92 S.Ct. at 2720. Rather the cases involved claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties, that is, intervention "in the internal determinations of a national political party, on the eve of its convention, regarding the seating of delegates." 409 U.S. 4, 92 S.Ct. at 2720. "* * * for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions." 409 U.S. 5, 92 S.Ct. at 2720.

But the case here does not involve the internal determinations of a party as to the seating of delegates. Here the question presented is whether there will be a deviation from the equality of voting power at the Republican 1976 Convention and if so whether such is supported by legitimate justification. This is the one-man-one-vote question that is to be found in the process of a national political party convention which nominates candidates for President and Vice President of the United States. This was noted by Mr. Justice Pitney in his concurring opinion in Newberry v. United States, 256 U.S. 232, 285-286, 41 S.Ct. 469, 484, 65 L.Ed. 913 (1921), when he stated: "* * * every voter comes to the polls

on the day of the general election confined in his choice to those few candidates who have received party nominations * * *. As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made." Such being the case, courts are competent to examine the matter of the equality of voting power of delegates at conventions and any deviations therefrom. State of Georgia v. National Democratic Party, 145 U.S.App.D.C. 102, 109, 447 F.2d 1271, 1278 (1971). The distinguishing subject matter of *O'Brien* furnishes no justification for this Court to hold that it is without jurisdiction in this case. Defendants' motion to dismiss will be denied.

Defendants' motion to strike from the supplemental complaint is without merit. Plaintiffs' allegations comparing mathematically representatives to the 1976 Republican Convention by regions are not immaterial or irrelevant to the claims asserted by plaintiffs. The motion to strike will be denied.

## II. *Cross-Motions for Summary Judgment*

Plaintiffs have moved for a summary judgment on the grounds that the 1976 formula is constitutionally invalid. Defendants' motion for summary judgment, in addition to challenging this Court's jurisdiction and claiming that the subject matter of this action is not justiciable, contends that the 1976 formula is constitutionally sound. There are no genuine issues of material fact and this Court, having considered the pleadings, memoranda and affidavits as well as argument of counsel, finds that this case may be appropriately disposed of by summary judgment.

Defendants' motion for summary judgment will be denied. Hereinbefore this Court has found that it has jurisdiction and that the subject matter is justiciable.

Defendants' contention that the 1976 formula does not violate the Constitution is without merit as will hereinafter be pointed out.

To understand plaintiffs' challenge of the validity of the 1976 formula, it is necessary to break down Rule 30 into several parts and to treat each separately.

1. The basic delegation at the 1976 Republican Convention will consist of 1605 delegates, or 72% of the total number of delegates. As has been pointed out, those delegates result from apportioning to the states 3 delegates for each of the 535 electoral college votes. At the 1972 Republican Convention 80% of the total delegates were selected under the 1972 formula on the basis of electoral college votes. This Court in its earlier opinion did not find the selection of the basic delegation to the 1972 Convention and the formula for apportionment of such delegation lacking in merit. 343 F.Supp. 168. Nor will the selection of the basic delegation to the 1976 Convention as provided by the 1976 formula infringe on the Equal Protection Clause. Bode v. National Democratic Party, 146 U.S.App.D.C. 373, 379-380, 452 F.2d 1302, 1308-1309 (1971). Nor do plaintiffs object to the use of the electoral college vote as the basis for part of the apportionment to the 1976 Convention. P. 34, Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment.

2. Of the remaining delegates to the 1976 Convention, 27% will be bonus delegates.

(a) Of that 27%, 11% will be allocated on a uniform basis of 4.5 delegates (rounded to 5) to each of the 49 states which cast its electoral vote for the 1972 Republican nominee for President. The 1972 formula allocated as a bonus 6 delegates to each of the 43 states which cast its electoral vote for the Republican nominee for President in 1968 or, in that or a subsequent elec-

tion, elected a Republican Senator or Governor or Republican majority to the state's delegation to the House of Representatives of the Congress. In the prior opinion, this Court held that the allocation of the 6 bonus delegates to states qualifying for them did not meet constitutionally permissible standards in that such allocation under the 1972 formula violated the Equal Protection Clause of the Fourteenth Amendment. 343 F. Supp. 168, 177. The 1976 formula in allocating the 4.5 bonus delegates is essentially the same in this respect as the invalid 1972 formula and is equally invalid.

This conclusion was not reached without due consideration having been given to the some eighteen affidavits and statistical data submitted by defendants in support of their motion for summary judgment. All of the affiants are persons experienced in the working of the political process and particularly in the functioning of the Republican Party. Some now hold and others have held high government offices. Among the other affiants were professors of political science as well as officials of the Republican Party. The affidavits recorded the history of the Party's efforts over the years in developing rules for the selection of delegates to the Party's National Conventions. Some of the affidavits treated with the various interests represented at the Conventions through the delegates as well as efforts made to accommodate often conflicting interests. Some affiants expressed the view that the apportionment of delegates was a matter for the Party and not the courts. But notwithstanding the information furnished and opinions stated by the affidavits and accompanying statistics, the fact remains that the system of allocating uniform bonus delegates as provided in the 1976 formula violates the Equal Protection Clause.

(b) The 1976 formula also allocates 50 delegates, or 2% of the total delegates, to states on the basis of 1

additional delegate to each state which in November, 1972, or at any subsequent election held prior to January 1, 1976, elected a Republican Senator, a Republican Governor or Republicans to at least half of the state's seats in the United States House of Representatives. Again this provision is essentially the same as that in the 1972 formula for allocating uniform bonus delegates. The latter formula provided that any state, which did not cast its electoral vote in 1968 for the Republican nominee for President, would nevertheless be allocated 6 bonus delegates if at the 1968 election or any subsequent election, prior to the 1972 Convention, the state elected a Republican Senator or a Republican Governor or a Republican majority to the state's membership in the House of Representatives. The 1976 formula contains the same infirmity as was found in the 1972 formula. Both violate the Equal Protection Clause. 343 F.Supp. 168, 177.

(c) When this Court heretofore declared unconstitutional the allocation of a uniform number of bonus delegates as provided by the 1972 formula, it also declared:

> That a bonus system which would reward states producing Republican victories in certain specified elections, by allocating a number of delegates reasonably proportionate to the state's electoral college votes or the number of Republican votes which produced the victory, or some combination of these factors, would have a constitutionally rational basis. [343 F.Supp. at 177.]

The 1976 formula apportions 312 delegates, or 14% of the total delegates, to states on the basis of 60% of the electoral vote of each of the 49 states which cast its electoral vote for the 1972 Republican nominee for President. Thus, in this respect, the 1972 Republican Convention conformed the 1976 formula with this Court's earlier opinion and order.

But plaintiffs challenge this apportionment of bonus votes as being unreasonable and not related to the actual Republican votes cast in 1972 for the Republican nominee for President. They base their case principally on statistical data and conclusions they draw therefrom. Thus, for example, they would show that based on the total number of Republican votes cast in the eight most populated states compared to those cast in the six least populated states the former would be underrepresented in the 1976 Convention while the latter would be greatly overrepresented. And they argue that Massachusetts, the only one of the 50 states which did not cast its electoral vote for the 1972 Republican nominee for President, would not only be grossly underrepresented in the 1976 Convention but it in fact would be penalized.

But plaintiffs' arguments overlook the difficulty in determining just what is the voting strength of a political party in any state. It is common knowledge that in modern day political life in the United States, the individual voter in large part is not wed to any political party. There is what has become known as the political independent who disavows affiliation with any political party and casts his vote for the nominee or issue or both. In fact, in 15 states there is no registration of voters by party.[5]

The results of the 1972 national election bear out the conclusion that the American voter picks and chooses from among candidates and political parties. A few examples will suffice. While 49 states cast their electoral votes for the Republican nominee for President, at the same time the voters in 16 of the 33 states voting for United States Senators elected Democrats. Out of the 18 states electing Governors, the voters in 11 states chose Democrats. In California 23 of the 43 House

[5] P. 12, Cramer affidavit, in support of defendants' motion for summary judgment.

members elected were Democrats. 19 of the elected 24 Texas members of the House of Representatives were Democrats. And in Pennsylvania the voters chose 13 Democrats and 12 Republicans as House members. Florida voters sent 11 Democrats and 4 Republicans to the House of Representatives as a result of the November 1972 election.[6]

While the relative strength of the two major parties in the total number of votes cast in 1972 may be questioned in light of the changing patterns in the choice of candidates for the several offices, there can be no doubt of the strength of the Republican Party when measured by the electoral college vote. It was the electoral vote of 49 states that elected the 1972 Republican nominee for President. And it was on that vote that the 1976 formula would apportion some of the bonus delegates. Massachusetts, contributing nothing to the Republican strength by this ultimate test, cannot be said to be penalized by being denied such bonus delegates.

Plaintiffs' challenge to such apportionment of bonus delegates is unpersuasive and, therefore, does not alter this Court's earlier conclusion that a system which rewards states producing Republican victories, by allocating a number of delegates reasonably proportionate to a state's electoral vote, has a constitutionally rational basis.

3. The 1976 formula allocates 14 delegates to the District of Columbia, 8 delegates to Puerto Rico, 4 delegates to the Virgin Islands and 4 to Guam. Plaintiffs assert that in each case the allocation is arbitrary and capricious and results in overrepresentation.

Under the 1972 formula, 9 delegates were allocated to the District of Columbia. Plaintiffs challenged that

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[6] The results and comparisons were gleaned from Exhibits L-6, L-7 of the Osborn July 31, 1973, affidavit in support of plaintiffs' motion for summary judgment.

allocation and sought to have it declared impermissible. This Court refused to do so. 343 F.Supp. at 177. The increase in the District of Columbia delegation from 9 to 14 delegates is in keeping with the Republican Party's decision to enlarge the 1976 Convention by increasing the delegates to 2242, or two-thirds again the size of the 1972 Convention. The increase in the number of the delegates from the District of Columbia in 1976 will be in keeping with the enlargement of the Convention that year. This Court will not disturb that allocation.

In the earlier opinion, this Court upheld the 1972 formula allocation of delegates to the Territories. 343 F.Supp. at 178. The increase in the number of delegates in 1976 from the Territories is appropriate in view of the increase in the total number of delegates at that Convention.

In view of the foregoing, defendants' motion for summary judgment that their 1976 formula is constitutionally sound will be denied insofar as it embraces the uniform allocation of bonus delegates. Plaintiffs' motion for summary judgment will be granted in part in that this Court will declare the uniform allocation of bonus delegates as violating the Equal Protection Clause of the Constitution and will enjoin defendants from allocating bonus delegates on such a uniform system. In all other respects plaintiffs' motion for summary judgment will be denied, including the conditioning of the effectuation of any rule which may be adopted by defendants for the apportionment of delegates to the 1976 Convention upon approval by this Court.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 2238-71

RIPON SOCIETY, INC., ET AL.,
*Plaintiffs*

v.

NATIONAL REPUBLICAN PARTY AND
REPUBLICAN NATIONAL COMMITTEE,
*Defendants*

## ORDER

(January 11, 1974)

This cause having come on before the Court on defendants' motion to dismiss, defendants' motion to strike from the supplemental complaint, defendants' motion for summary judgment, and plaintiffs' motion for summary judgment, and the Court having considered the memoranda, affidavits and exhibits submitted in support thereof and in opposition thereto, and having heard argument of counsel, and having filed an opinion in this case stating its findings and conclusions with respect to said motions, it is this 11th day of January, 1974,

ORDERED:

1. That defendants' motion to dismiss be and the same is hereby denied;

2. That defendants' motion to strike from the supplemental complaint be and the same is hereby denied;

3. That defendants' motion for summary judgment be and the same is hereby denied;

4. That plaintiffs' motion for summary judgment is granted to the extent that the Court declares:

(a) That the allocation to the 1976 Republican National Convention of 4½ delegates at large to each state casting its electoral vote, or a majority thereof, for the 1972 Republican nominee for President, and 1 delegate at large to each state which at the 1972 Presidential election, or any subsequent election held prior to January 1, 1976, elected a Republican United States Senator, provided such additional delegates at large award to any state shall not exceed 2; a Republican Governor, provided such additional delegate at large award to any state shall not exceed 1; a Republican membership of at least half of the state's delegation to the United States House of Representatives, provided such additional delegate at large award to any state shall not exceed 1, does not meet constitutionally permissible standards in that such allocation violates the Equal Protection Clause of the Fourteenth Amendment;

(b) That a bonus system which would reward states casting their electoral vote for the 1972 Republican nominee for President by allocating a number of delegates to such states on the basis of 60% of the electoral vote of each of such states would have a constitutionally rational basis.

5. That defendants are hereby enjoined from adopting a formula for the apportionment of delegates to the 1976 Republican National Convention which would allocate a uniform number of bonus delegates to states qualifying for them with no relation to the state's electoral college vote.

/s/ William B. Jones
U.S. District Judge

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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 74-1337

THE RIPON SOCIETY, INC., ET AL., APPELLANTS

v.

NATIONAL REPUBLICAN PARTY, ET AL

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No. 74-1358

THE RIPON SOCIETY, INC., ET AL

v.

NATIONAL REPUBLICAN PARTY, ET AL., APPELLANTS

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Appeals from the United States District Court for the District of Columbia

(D.C. Civil Action 2238-71)

Decided March 5, 1975

Before: BAZELON, Chief Judge, DANAHER, *Senior Circuit Judge* and WILLIAM WAYNE JUSTICE,* *United States District Judge* for the Eastern District of Texas

Opinion for the Court filed by *Chief Judge* BAZELON.

Dissenting opinion filed by *Senior Circuit Judge* DANAHER.

BAZELON, *Chief Judge*: The Ripon Society is a research and policy organization composed of young business, professional, and academic people who are associated with the National Republican Party. The Ripon Society and nine individual plaintiffs who are registered Republican voters in seven states and the District of Columbia challenge the formula for apportionment of delegates to the 1976 Republican National Convention. This challenge is directed against the National Republican Party and the Republican National Committee. This action was originally filed prior to the 1972 convention and resulted in an order of the District Court granting relief in part to plaintiffs and denying relief in part. The plaintiffs and defendants both appealed with defendants requesting a stay of the District Court order until after the 1972 Republican Convention. This Court denied a stay but Justice Rehnquist granted that relief. After the election, both parties moved to dismiss the appeal and it was so ordered. The plaintiffs then filed a second complaint challenging the formula for apportionment of delegates to the 1976 convention. The District Court again granted relief in part and denied relief in part. Both parties now appeal from that order.[1]

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* Sitting by designation pursuant to 28 U.S.C. § 292(d).

[1] Ripon Soc'y, Inc. v. National Republican Party, 343 F. Supp. 168 (D.D.C.), *intervention granted and stay denied,*

The challenged apportionment formula is set out in Rule 30 adopted by the 1972 Republican National Convention. The District Court summary of this formula is reproduced in the margin.[2] The focus of plaintiffs' concern are the 607 delegates, representing 27% of the

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Nos. 72-1633,-1634 (D.C. Cir. August 3), *stay granted sub nom.* Republican State Central Comm. of Arizona v. Ripon Soc'y, Inc., 409 U.S. 1222, *appeal dismissed,* Nos. 72-1633,-1634 (D.C. Cir. Nov. 29, 1972), *on subsequent complaint,* 369 F. Supp. 368 (D.D.C. 1974).

[2] 1. The 1976 Republican Convention will comprise a total of 2,242 delegates from the states, the District of Columbia, Puerto Rico, Guam and the Virgin Islands.

2. 1605 delegates, or 72%, will be apportioned to the states on the basis of 3 delegates for each of the states' 535 electoral votes; that is, 3 delegates for each state's two United States Senators and 3 delegates for each Representative in the United States House of Representatives from each state.

3. 245 delegates, or 11%, will be allocated on the basis of a uniform bonus of 4.5 delegates (rounded to 5) to each of the 49 states which cast its electoral vote for the 1972 nominee for President.

4. 312 delegates, or 14%, will be apportioned to the states on the basis of 60% of the electoral vote of each of the 49 states which cast its electoral vote for the 1972 Republican nominee for President.

5. 50 delegates, or 2%, will be apportioned to states on the basis of one additional delegate to each state which in November, 1972, or at subsequent election prior to January 1, 1976, elected a Republican Senator, Governor, or Republicans to at least half of the state's seats in the House of Representatives; but in no event shall there be awarded more than 4 delegates to a state.

6. 16 delegates will be allocated to the District of Columbia, 8 to Puerto Rico, and 4 each to Guam and the Virgin Islands; all of which will constitute 1% of the total delegates to the 1976 Republican Convention.

369 F. Supp. at 371.

total of approximately 2,242 delegates to the 1976 Convention,[3] which are apportioned on the basis of a Republican victory in the 1972 presidential election and on the basis of Republican victories in 1972 and 1974 senatorial, gubernatorial and congressional elections.[4] These so-called "victory bonus" delegates are apportioned in part on a uniform basis of 4.5 delegates for each state that voted Republican in 1972 (hereinafter referred to as a "uniform" victory bonus) and apportioned in part on a proportional basis in which each state that voted Republican in 1972 is given additional delegates totalling 60% of the electorial college vote of that state (hereinafter referred to as a "proportional" victory bonus). These two kinds of "victory bonus" delegates, plaintiffs allege, create an invidious discrimination against certain regions and certain states and are thus apportioned in violation of Article II, Section 1 of the Constitution and either the Fifth Amendment or the Fourteenth Amendment. The District Court in

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[3] The total of 2,242 may increase slightly as a result of the 1974 senatorial, congressional and gubernatorial elections.

[4] Plaintiffs also challenge the 16 delegates allocated to the District of Columbia and the 16 delegates allocated to the territories of Puerto Rico, Guam and the Virgin Islands. As to the latter 16 representing the territories, we hold that apportionment is permissible. Bode v. National Democratic Party, 452 F.2d 1302, 1310 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972). As for the 16 delegates representing the District of Columbia, we think they should be assimilated to the formula applied to other jurisdictions which cast Republican votes and Electoral votes for President, at least for purposes of analysis in this opinion. Whether a deviation from the apportionment formula solely for the District of Columbia may be justified as a *de minimus* deviation designed to achieve a legitimate party interest, *cf.* Mahan v. Howell, 410 U.S. 315 (1973), cannot be determined until the Republican National Committee or the National Republican Party have revised their apportionment plan in light of this opinion.

its second consideration of the matter upheld the use of the "victory bonus" concept but forbade further use of "uniform" victory bonuses in which each state received an equal number of additional delegates in return for victory regardless of the population of the state. We find, for reasons expressed below, that the "victory bonus" concept is unconstitutional in toto and, therefore, reverse the order of the District Court in part, affirm it in part and remand the cause with instructions.

## I. The Effect of the Victory Bonus

Plaintiffs have presented a rather detailed, but in part incomplete, statistical showing of the effect of the victory bonus concept. The heart of this showing is that the concept produces very significant deviations among the states as to (1) the number of 1972 Republican votes for President represented by delegates from each state; (2) the number of 1968-71 Republican votes for President and various state-wide offices represented by delegates from each state; and (3) the amount of total population represented by delegates from each state. According to this presentation, which was not challenged before the District Court, the maximum deviation in category (1) is 11.19 to 1. That is, each delegate from Florida, under the victory bonus scheme, would represent 28,148 1972 Republican votes for President while each delegate from the District of Columbia would represent 2,515 such votes. The maximum deviation in category (2) is 12.05 to 1 with each delegate from Pennsylvania representing 25,181 1968-71 Republican votes while each delegate from Alaska represents 2,089 of such votes. The maximum deviation in category (3) is 7.44 to 1 (if the victory bonus is applied in terms of the 1972 election) or 8.67 to 1 (if it applied in terms of the 1968-71 elections). As applied in terms of the 1972 election, each delegate from Massachusetts would represent 132,306 citizens while each delegate from Alaska would rep-

resent 17,775 citizens. As applied in terms of the 1968-71 elections, each delegate from New York would represent 147,892 citizens while each delegate from Alaska would represent 16,787 citizens.

The major weakness in plaintiffs' showing is the failure to provide us with data on the average deviation from the mean or ideal number of 1972 Republican voters, 1968-71 Republican voters or total population which each delegate should represent. A summary analysis of plaintiff's raw data, however, indicates that this average deviation is as significant statistically as the maximum deviations discussed above. For example, the mean number of citizens which should be represented by each delegate (if the victory bonus is applied in terms of the 1972 election) is 91,278; the mean number which should be represented by each delegate (if the victory bonus is applied in terms of the 1968-71 elections) is 99,993. Making the heroic assumption that a 5% deviation should be statistically insignificant, we find that the victory bonus applied in terms of 1972 will produce 12 states whose delegates will each represent more than 91,278 plus 5% and 27 states whose delegates will represent less than 91,278 minus 5%. Even more significant results than these are obtained if the victory bonus is applied in terms of the 1968-71 elections. As so applied, the victory bonus will produce 17 states whose delegates will each represent more than 99,993 plus 5% and 28 states whose delegates will each represent less than 99,993 minus 5%.[5]

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[5] The figures upon which these computations are based may be found in the Joint App. at 79a, 81a, 83a, 145a-47a, 182a-85a. The plaintiffs have also produced data on the deviations among the different regions of the country in the number of Republican voters or amount of total population represented by delegates from those regions. The defendants moved to strike this material from the complaint, alleging that the regional groupings were so arbitrary as to be immaterial under Fed. R. Civ. P. 12(f). The District Court denied this

We have no reason to believe that the application of this analysis to the mean representation of 1972 Republican voters or of 1968-71 Republican voters will not produce similar results. The legal significance of these statistics is, of course, a question wholely distinct from their statistical significance.

## II. Threshold Issues: State or Governmental Action and Justiciability

Defendants initially challenge the jurisdiction of the District Court, alleging that there is no "state action" or "governmental action" involved in either the Republican National Committee or the National Republican Party.[6]

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motion and we affirm that ruling. However, we find that plaintiffs' regional data is not helpful to an understanding of the deviations produced by the victory bonus.

We do find relevant the following additional statistics contained in the Joint App. at 140a-41a, 319a: States with 50% of the delegates under the victory bonus scheme cast only 38.6% of the 1972 Republican presidential vote, have only 38.9% of the population and have only 45.9% of the Electoral College vote. Furthermore, under the victory bonus scheme the eight most populous states would have 39.1% of the delegates, 42.4% of the Electoral College vote, 48.6% of the 1972 Republican vote and 48.7% of the total population.

[6] Primary jurisdictional reliance is placed on 42 U.S.C. § 1983 (1970); 28 U.S.C. § 1343(3) (1970) and on Article II, § 1 of the Constitution and the Fifth Amendment. Since the Constitution does not normally confer jurisdiction by itself, we take that assertion of jurisdiction to be grounded in the general "federal question" statute, 28 U.S.C. § 1331 (1970). The federal question in this case involves application of the terms of the Constitution and the Constitution applies only to action of the Federal government (and to the states through the Fourteenth Amendment) and not to private parties. *Cf.* Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 133-34 (1973) (Stewart J. concurring) (First Amendment); Public Utilities Comm'n v.

They furthermore argue that the plaintiffs' claims are not justiciable and that, in any event, plaintiff Ripon Society has no standing to assert such claims. They finally argue, as a threshold matter, that the Republican National Party is not a juristic entity and has no legal capacity to sue or be sued. All of these claims, with the exception of the *jus tertii* standing of the Ripon Society, were considered and rejected in *Georgia v. National Democratic Party*, 447 F.2d 1271, 1273 n.2, 1274-78 (D.C. Cir.), *cert. denied*, 404 U.S. 858 (1971). These holdings in *Georgia* were followed without dissent in *Bode v. National Democratic Party*, 452 F.2d 1302, 1304-05 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972) and without comment in *O'Brien v. Brown*, 469 F.2d 563, 567 (D.C. Cir.), *stayed*, 409 U.S. 1, *dismissed as moot*, 409 U.S. 816 (1972).[7] As to the *jus tertii* standing of

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Pollak, 343 U.S. 451, 461-62 (1952) (Fifth Amendment). Article II is clearly directed to the Federal government. The other two jurisdictional statutes apparently require *state* action. *See* Adickes v. S.H. Kress Co., 398 U.S. 144 (1970). Plaintiffs primarily seek to prove state action on the part of the defendants but some of their claims seem to imply that the defendants are also colored with Federal government action. The unique nature of a national political party composed of an association of state parties makes any neat distinction between governmental and state action impossible. As will be developed below, the same standard applies no matter how the status of the defendants is characterized.

[7] On status of the National Republican Party as a juristic entity which may sue and be sued, *see* Fed. R. Civ. P. 17(b) ("In all other cases capacity to sue and be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of the state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution . . . of the United States."); United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344 (1922). *See also* Busby v. Electric Utility Employees

the Ripon Society, even though the right to vote is "personal",[8] it is settled that an organization may assert the rights of its members.[9] There is no claim that the members of the Ripon Society do not have standing.

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Union, 147 F.2d 865 (D.C. Cir. 1945) for the law of the District of Columbia.

The weight of authority is in accord with the holdings of *Georgia*. *See* Seergy v. Kings Co. Republican Co. Comm., 459 F.2d 308, 313-315 (2d Cir. 1972); Redfearn v. Delaware Republican State Comm., 362 F. Supp. 65, 70-71 (D. Del. 1973); Riddell v. National Democratic Party, 344 F. Supp. 908, 912 (S.D. Miss. 1972); Barthelmes v. Morris, 342 F. Supp. 153, 157 (D. Md. 1972); Doty v. Montana State Democratic Central Comm., 333 F. Supp. 49, 51 (D. Mont. 1971); Maxey v. Washington State Democratic Comm., 319 F. Supp. 673, 678 (W.D. Wash. 1970); Anderson v. Meisser, 285 F. Supp. 974, 975 (E.D.N.Y. 1968); Bentman v. Seventh Ward Democratic Exec. Comm., 421 Pa. 188, 218 A.2d 261 (1966). The leading contrary holding is Irish v. Democratic-Farmer-Labor Party of Minnesota, 399 F.2d 119 (8th Cir.), *aff'g*, 287 F. Supp. 794 (D. Minn. 1968). Two other oft-cited cases involved "internal party affairs" as that term is defined herein and are thus distinguishable. *See* Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965); Smith v. State Exec. Comm., 288 F. Supp. 371 (N.D. Ga. 1968). This distinction was recognized in *Seergy* at 315 and by Judge Goodwin in a companion case decided with *Maxey*, Dahl v. Republican State Comm., 319 F. Supp. 682 (W.D. Wash. 1970). The *Irish* case did not authoritatively decide the issues of state action and justiciability, although the District Court indicated doubts on the former issue and the Court of Appeals indicated doubts on the latter. The actual holding of the case was that since there was no malapportionment at the precinct level in the selection of Minnesota's delegates to the 1968 Democratic National Convention, malapportionment at the county and state level did not violate the one person-one vote standard. For reasons discussed in note 40 *infra*, we think this conclusion is not correct.

[8] Reynolds v. Sims, 377 U.S. 533, 561 (1964), *citing* United States v. Bathgate, 246 U.S. 220, 227 (1918).

[9] *See* National Automatic Laundry & Cleaning Council v. Schultz, 443 F.2d 689, 693-94 (D.C. Cir. 1971) and cases cited; *cf.* Sierra Club v. Morton, 405 U.S. 727, 739 (1972);

The defendants would have us reconsider these recent decisions rendered by seven different judges of this Court on the basis of the per curiam opinion issuing a stay in *O'Brien v. Brown*, 409 U.S. 1 (1972) and on the basis of Justice Rehnquist's opinion as Circuit Justice issuing a stay in this case.[10] In those opinions the Court and Justice Rehnquist indicated "grave doubts" about our holdings in *O'Brien* on the issues of state action and justiciability. The Court did not state the source of its doubts and we agree with the District Court that *O'Brien* can be distinguished as concerning the internal affairs of a political party and not the right of equal access to decision of those internal affairs.[11] This is a

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NAACP v. Button, 371 U.S. 415, 428 (1963). This view was implicitly accepted in Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964).

[10] Republican State Central Comm. of Arizona v. Ripon Soc'y, Inc., 409 U.S. 1222 (1972).

[11] 369 F. Supp. at 372-73. The Supreme Court in *O'Brien* stated that it had "grave doubts" about judicial intervention "in the internal determinations of a national political party, on the eve of its convention. . . ." 409 U.S. at 4. Thus, the grave doubts may be only as to the *timing* of the judicial intervention, a subject which has always been of the utmost concern in reapportionment case law. *See* Ely v. Klahr, 403 U.S. 108, 114-15 (1971); Note, *Presidential Nominating Conventions: Party Rules, State Law and the Constitution*, 62 GEO. L.J. 1621, 1636-37 & n.73 (1974). This concern with timing might explain the decision in *Irish* and the reason the Court cited it. The other citations were to cases involving "internal party affairs" as that is defined herein, *i.e.* the citations to *Lynch* and *Smith*, *see* note 7 *supra* and to Ray v. Blair, 343 U.S. 214 (1952), *see* note 47 *infra*, and to what many believe is the first "political question" case, Luther v. Borden, 7 How. 1 (U.S. 1849), in which the Supreme Court was asked to determine which of two competing governments in the state of Rhode Island was legitimate. In Cousins v. Wigoda, 95 S.Ct. 541, 545-46 n. 4 (1975) the Court expressly declined to comment on the state action and justiciability issues.

distinction of considerable subtlety which we shall discuss in more detail below. Despite the fact that *O'Brien* is distinguishable on its facts and involved only a bare statement of "grave doubts", we think it appropriate to reconsider the holdings of *Georgia* and to reaffirm them in their entirety.

The *Georgia* court relied on two related concepts to find state action in the apportionment of delegates to the national conventions of the two major political parties. First, the court correctly noted that state action had been found in the conduct of party primaries, conventions and committees for the purpose of proscribing racial discrimination. If this amount of state action be conceded, the court found and we think the logic is inescapable that the actions of the state's delegates acting in concert to apportion their own strength and thereby determine the weight to be given their constituents' previous vote in the state delegate selection procedures must also be state action. These cases upon which the *Georgia* court relied might be distinguished as involving racial discrimination, an involvement which apparently decreases the "amount" of state action needed to activate the commands of the Fourteenth or Fifth Amendment.[12] However, the Supreme Court in *Gray v. Sanders*, 372 U.S. 368, 374-75 (1963) seemed to take a broader view of these racial discrimination cases, at least in terms of party primaries.

But even if these entirely reasonable arguments are not persuasive, we think the *Georgia* court also correctly determined that "by placing the nominees' names on the ballot, the states, in effect, have adopted [the] narrowing process [produced by the major party primaries] as a

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[12] *See* Jackson v. Statler Foundation, 496 F.2d 623, 628-29 (2d Cir. 1974); Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1969). This distinction is suggested in O'Brien v. Brown, 409 U.S. 1, 4 (1972) and in Cousins v. Wigoda, 95 S.Ct. 541,

necessary adjunct of their election procedures." [13] Indeed, the Supreme Court has recently determined that the state has a "not only permissible, but compelling" [14] interest in enforcing this narrowing process. Furthermore, the narrowing process may be seen as a "governmental function" [15] and thus be implicitly state action.

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550-51 (1975) (Rehnquist, J. concurring in the result). *But compare* the virtually identical reasoning of Jackson v. Metropolitan Edison Co., 95 S.Ct. 449 (1974) *and* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

[13] 447 F.2d at 1276.

[14] Storer v. Brown, 415 U.S. 724, 736 (1974). *See also id.* at 735; American Party of Texas v. White, 415 U.S. 767, 780-81 (1974).

[15] This was the broader view of Terry v. Adams, 345 U.S. 461 (1953) and Smith v. Allwright, 321 U.S. 649 (1944) suggested by the *Georgia* court. *Cf.* Evans v. Newton, 382 U.S. 296 (1966); Local 590, Amal. Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Silver v. New York Stock Exchange, 373 U.S. 341 (1963); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); Marsh v. Alabama, 326 U.S. 501 (1946); Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952); O'Neill v. Grayson Co. War Mem. Hospital, 472 F.2d 1140 (6th Cir. 1973); Sams v. Ohio Valley General Hospital Ass'n, 413 F.2d 826 (4th Cir. 1969); Lavoi v. Bigwood, 457 F.2d 7 (1st Cir. 1972). The crux of all these governmental action cases is the grant or maintenance of monopoly power in the private sector.

The recent case of Jackson v. Metropolitan Edison Co., 95 S. Ct. 449 (1974) establishes that monopoly status is not sufficient in and of itself to permit a finding of state action, even though monopoly status is probative in that regard. Rather *Jackson* holds that there must be some "nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. *Moose Lodge No. 107* [v. *Irvis*, 407 U.S. 163, 176 (1972)]." *Id.* at 453. *See also* Powe v. Miles, 407 F.2d 73 (2d Cir. 1969). Part of that nexus lies in the nature of the function performed by the entity which is claimed to be private. *See* 95 S.Ct. at 454. Here the function of narrowing the range of candidates eligible for the general election through a formal

Finally, the states and the federal government have served to institutionalize the major parties and by implication their narrowing process through protection of incumbents in reapportionment [16] and perhaps in the future through public financing of both primary and general election campaigns of major party candidates.[17] These "state action" arguments, of course, do not apply to the apportionment of delegates or committee people responsible for "the internal management and business" of the party. *See Seergy v. Kings County Republican County Committee*, 459 F.2d 308, 313-14 (2d Cir. 1972).

Once having determined that state action is implicated in delegate apportionment, the threshold issue of justiciability is answered by *Baker v. Carr*, 369 U.S. 186

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election procedure is a function traditionally controlled by the state through election laws. The fact that states have not traditionally controlled the particulars of party apportionment is not in our view cause to nullify state action. If the narrowing function delegated to political parties by the state is to be fairly exercised, that function must be limited by the one person-vote principle. In short, the power of apportionment inheres in the narrowing function which political parties exercise and thus the requisite nexus is established.

[16] This protection of incumbents has been permitted by the Supreme Court under the labels "constituency-representative relations", White v. Weiser, 412 U.S. 783, 791 (1973); *see* Burns v. Richardson, 384 U.S. 73, 89 n.16 (1966); Cousins v. City Council of the City of Chicago, 503 F.2d 912, 917 (7th Cir. 1974) and the "political fairness" principle, Gaffney v. Cummings, 412 U.S. 735, 752-53 (1973).

[17] *See* Int. Rev. Code of 1954 §§ 9001-12; 9031-42, 26 U.S.C. §§ 9001-12; 9031-42 (Supp. III 1973) *as enacted in part and amended in part by* Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, §§ 401-09, 88 Stat. 1263. *See also* the spending limitations in Pub. L. 93-443. This new law has not, however, been sustained against a constitutional attack. Such an attack is presently pending in this Court. Buckley v. Valeo, No. 74-1061 (D.C. Cir. filed Jan. 2, 1975).

(1962) as the *Georgia* court correctly held. It is difficult to conceive of a different result. However, as the *Georgia* court was careful to point out, a finding of justiciability does not eliminate consideration of the policies that underlie the doctrine of justiciability or, indeed, the policies that underlie the "state action" doctrine. Of particular relevance here, in our view, is the institutional structure promoted by the First Amendment. *See Cousins v. Wigoda*, 95 S.Ct. 541, 547-48 (1975).[18] Under that structure, political thought and organization are delegated to the people; the government may not intervene, through any branch including the judiciary, except in the most narrow and compelling circumstances. To be sure, courts have seemingly permitted some intervention into this power reserved for the people to protect the "integrity" of the electoral process[19] and, indeed, to protect the First Amendment or other rights of members

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[18] *Cf.* the reasoning of Storer v. Brown, 415 U.S. 724, 728-29, 756 (1974) (opinions of the Court and of Brennan, J. dissenting); Kusper v. Pontikes, 414 U.S. 51 (1973); Bullock v. Carter, 405 U.S. 134 (1972); Jenness v. Fortson, 403 U.S. 431 (1971); Hadnott v. Amos, 394 U.S. 358 (1969); Williams v. Rhodes, 393 U.S. 23 (1968); NAACP v. Button, 371 U.S. 415 (1963); Ray v. Blair, 343 U.S. 214 (1952); Tribe, *Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 33-50 (1973).

[19] The most obvious interventions are those sanctioned at least implicitly in Local 562, Pipefitters v. United States, 407 U.S. 385 (1972); United States v. International Union, United Auto Workers, 352 U.S. 567 (1957); United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973); United States v. Harriss, 347 U.S. 612 (1954). More subtle interventions were permitted in Richardson v. Ramirex, 94 S.Ct. 2655 (1974); Storer v. Brown, 415 U.S. 724 (1974); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); NLRB v. Gissel Packing Co., 395 U.S. 575, 616-20 (1969). Cousins v. Wigoda, 95 S.Ct. 541 (1975) holds that no single state has a compelling interest in regulating national political conventions.

of certain associations invested with monopoly or quasi-monopoly powers.[20] The sum total of this discussion is that the policies forwarded by the doctrines of justiciability and state action should not be permitted to foreclose all judicial intervention into the affairs of major political parties. Rather those policies are implicated in the merits of whatever judicial intervention is attempted. In point of fact, the Equal Protection Clause itself could be read to make all disputes justiciable; but in evaluating equal protection claims, particularly as they relate to an evaluation of a legislative purpose, the policies of justiciability—particularly the notion of institutional competence—are a source of the traditional judicial deference to legislative action.[21] This use of policies of justiciability and state action may be seen in recent reapportionment case law.[22] We thus think our inquiry should be directed

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[20] *Compare* International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); Silver v. New York Stock Exchange, 373 U.S. 341 (1963); 29 U.S.C. § 411 (1970) *with* United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967). *See also* cases cited Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 YALE L.J. 120, 132-40 (1974) for authority on common law judicial intervention into private associations. *Compare* the analysis of the cited Note *with* the analysis of Ashby v. White, 2 Ld. Raym. 938 (1702), cited in Gray v. Sanders, 372 U.S. 368, 375 n.7 (1963). *See also* O'Brien v. Brown, 469 F.2d 563, 569-70 (D.C. Cir.) *stayed*, 409 U.S. 1 *vacated as moot*, 409 U.S. 816 (1972); Powell v. McCormack, 395 U.S. 486 (1969). *But see* Cousins v. Wigoda, 95 S.Ct. 541 (1975).

[21] *Cf.* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 365 (1973); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

[22] *See* Cousins v. City Council of the City of Chicago, 503 F.2d 912, 917 (7th Cir. 1974) *interpreting* Gaffney v. Cummings, 412 U.S. 735 (1973) and White v. Weiser, 412 U.S. 783 (1973). *See also* Mahan v. Howell, 410 U.S. 315 (1973);

to specific claims and specific associational activities before the policies of justiciability and state action may be brought into full view. The discussion herein is, of course, limited to the activities of the major political parties, the Republicans and the Democrats, and we intimate no opinion on whether it might also be applicable to any independent or minor party. Such an application would clearly require an extension of the reasoning stated above.

## III. Deviations From the One Person-One Vote Standard and Justifications Therefor

1. Having found sufficient indicia of state action and justiciability, we address plaintiffs' substantive contention: that the apportionment created by the victory bonus formula violates the principle that each voter is entitled to have his or her vote counted equally with other voters.[23] The findings of state action and justiciability, of course, establish that this principle must apply to some extent but as the *Georgia* court warned those findings do not

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Abate v. Mundt, 403 U.S. 182 (1971). This use of the concept of justiciability is apparent in *Georgia*, 447 F.2d at 1277-78, and may be seen in Justice Stewart's dissenting opinion in Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 749-51 (1964). The interpolation of policies of "state action" and justiciability may be seen in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179-80 (1972) (Douglas, J. dissenting); Powe v. Miles, 407 F.2d 73 (2d Cir. 1969).

The deference mandated by these policies takes basically three forms: (1) deference as to the proper remedy for a violation of a constitutional principle; (2) deference to the particular balance of legitimate, constitutionally acceptable concerns; and (3) deference to a decision that a particular policy is or is not protected or proscribed by the Constitution. In our view, only the third form of deference is not applicable to judicial review of apportionment of delegates of major party national conventions.

[23] *See* Reynolds v. Sims, 377 U.S. 533, 554-64 (1964).

establish that the principle will operate equally on political parties as on state and federal legislative bodies. Before turning to possible differences in application, we initially note that the figures discussed in Part I above establish that the deviations from the standard of one person-one vote created by the victory bonus are not sufficiently *de minimus* to foreclose judicial intervention to reduce that deviation. The deviations mentioned in Part I above are far in excess of the deviations permitted in *Gaffney v. Cummings*, 412 U.S. 735, 737 (1973), assuming that the more lax standard applied to the states is proper to test apportionment of a national political party. They are more than that permitted in *Mahan v. Howell*, 410 U.S. 315, 319 (1973), assuming that the *Mahan* court did not rely on the existence of a legitimate justification for the deviation involved therein. We note that the plaintiffs' data is not complete, particularly on the issue of the average deviation from the mean or ideal delegate representation but in the absence of any challenge in the District Court, we think it is sufficient to indicate a *prima facie* violation of the one person-one vote standard. If the defendants wish to further challenge plaintiffs' data they may do so by proper motion in the District Court.

2. This Court held in the *Bode* case that a political party may deviate from the one person-one vote standard and apportion delegates on the basis of the electoral college strength of a state and not on the total population of the state alone.[24] The Court's reasoning is sound and we hereby reaffirm its holding. The maximum deviation among the states between the number of 1972 Republican votes or the amount of total population represented by each electoral college vote is 4.4 to 1.[25] The deviations discussed in Part I above are substantially in

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[24] 452 F.2d at 1307-09.

[25] *See* statistics in the Joint App. at 83a, 182a-85a.

excess of this figure and are not *de minimus* under the standards of *Mahan* and *Gaffney*.[26] However, we note that those deviations are produced solely by the victory bonus and not by the apportionment formula which allocates the remaining 72% of the delegates. Plaintiffs do not challenge that apportionment.

3. The decisions in both *Bode* and *Georgia* establish further that a political party may also deviate from the one person-one vote standard to approximate a different principle of one Republican or one Democrat-one vote.[27]

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[26] As noted on page 5 *supra*, the maximum deviation in total citizens represented by each delegate is 7.44 to 1 (if the victory bonus is applied in terms of the 1972 election) or 8.67 to 1 (if it is applied in terms of the 1968-71 elections). Thus there is a better than 3 to 1 difference created by the victory bonus alone. In terms of average deviations, each elector in the electoral college should represent approximately 377,677 voters (the 1970 census of 203,184,772 divided by 538). Again using the 5% figure, the electoral college will produce 9 states whose electors will each represent 377,677 citizens plus 5% and 25 states whose electors will each represent 377,667 minus 5%. This figure is somewhat less than the corresponding figures discussed on page 5, but is of little aid in determining the extent to which the electoral college deviations on the average are less than the victory bonus deviations. A survey of the raw statistics contained in the Joint App. at 176a-77a, 83a-84a, 145a-46a convince us the electoral college deviations are substantially less. Some examples: New York has a deviation of approximately 30% from the 91,278 mean of citizens per delegate under the 1972 election (see page 5); a deviation of approximately 45% from the 99,993 mean of citizens per delegate under the 1968-71 elections; and a deviation of 15% from the 377,677 mean of citizens per elector. Texas has respective deviations of 20%, 43% and 12%. Utah has respective deviations of 40%, 50% and 30%. If the defendants have any dispute with these figures, they may contest them upon remand of the cause.

[27] 452 F.2d at 1305-07; 447 F.2d at 1278-79. *Cf.* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973); Burns v. Richardson, 384 U.S. 73, 90-97 (1966).

The party is not required to make this approximation and, indeed, if it does, it need not apportion all the delegates on that basis for a reason central to the disposition of this cause which will be discussed in more detail below. But the victory bonus is not directed to this purpose. It would seem highly irrational if it did.[28] We think the true purpose is to approximate party strength not in terms of persons but in terms of *states*. The victory bonus establishes a one Republican state-many votes standard.

4. The District Court approved the concept of a victory bonus because it held that a measurement of party strength in terms of states instead of in terms of people who have in the past or may in the future vote Republican was permissible under the electoral college system.[29] Without the electoral college system, such a scheme would, of course, be invalid under the principle of *Gray v. Sanders*, 372 U.S. 368 (1963), if it produced, as the victory bonus produces, a substantial deviation from the one person-one vote standard.[30] However, the District Court reasoned that the electoral college sanctions a "unit voting" scheme and thus the Republicans were entitled to use that scheme to measure their strength. The District Court buttressed this reasoning by reference to an

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[28] It would seem irrational for two reasons. First, such a scheme would not count Republican voters in states which did not vote Republican in the Electoral College. Second, party support under such a scheme would be ascertained on the basis of only one election which may or may not be representative.

[29] 369 F. Supp. at 375.

[30] *Gray v. Sanders* did not address the question of whether the deviation from the one person- one vote standard might be justified if it were an attempt to approximate party strength. Even if such a deviation were permitted, we think the deviation in this case is, as far as the present record permits us to conclude, beyond any such permissible deviation.

asserted purpose of the victory bonus to strengthen state party organization.[31] On the other hand, the District Court held that the use of the "uniform" bonus did not forward these purposes in regard to the large states, thus was not necessary to those purposes and, therefore, implicitly concluded that the uniform bonus was a deviation from the one person-one vote standard which was not justified.

Assuming for the moment the validity of the District Court's conclusion that the victory bonus concept was permissible, we have little doubt that its conclusion in regard to the uniform bonus is correct. It is not necessary to conceptualize the party interest as "compelling" or the one person-one vote standard as "fundamental" to conclude that any legitimately justified deviations from the one person-one vote standard must be reasonably tailored to the justification offered. The Supreme Court so held in *White v. Weiser*, 412 U.S. 783, 792 (1973).[32] Such a principle is merely a reflection of the increasing tendency to eschew reliance on fictional asserted justifications or purposes in favor of a more searching inquiry into the true purpose as that purpose may reasonably be read from the effect of the classification attacked.[33] If the purpose of the victory bonus is as the District Judge found, there was no further justification of the deviations than that necessary to measure party strength in the electoral college. Since large states have more electoral college votes than small states and since the record indicates that the uniform bonus produced greater deviations

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[31] 343 F. Supp. at 175-76. *See* note 36 *infra.*

[32] *See also* Storer v. Brown, 415 U.S. 724, 736, 745-46 (1974); Mahan v. Howell, 410 U.S. 315, 326-27 (1973).

[33] *See* Reese v. Dallas Co., 505 F.2d 879, 886 (5th Cir. 1974) (*en banc*); Note, *Legislative Purpose, Rationality and Equal Protection*, 82 YALE L.J. 123, 141-46 (1972) *discussing* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

than a purely proportional victory bonus,[24] the District Court was clearly correct in concluding that the uniform bonus was impermissible in light of its asserted justification.

5. However, we cannot conclude that the District Court was correct in its initial determination that the victory bonus was a permissible concept. We first note that it is not transparently obvious that the purpose of the victory bonus is to measure Republican strength in terms of state victory. First, there is the fact that 11% of the delegates are apportioned on the basis of a uniform victory bonus, a bonus system which is plainly not necessary to and is perhaps inconsistent with an ascertainment of party strength by state voting power in the electoral college. Second, party strength in the electoral college is measured on the basis of only one election—the most recent presidential election for virtually all of the bonus delegates. When the Republicans have an unusually good or an unusually bad presidential election year, *e.g.* 1964 and 1972, party strength in the electoral college is not correctly measured by the most recent presidential election. Furthermore, the brief for the Republican National Committee and the National Republican Party foregoes any reliance on a party strength justification such as was conceptualized by the District Court. We could, therefore, simply assume for purposes of decision the validity of a victory bonus geared to ascertainment of party electoral strength and rule only on the justification offered by the defendants for the bonus. We are, however, hesitant to do this since the two justifications—the party strength justification and the justification offered by defendants—are closely related and should be held invalid for similar reasons.

6. The purpose of the victory bonus, both uniform and proportional, as set forth by the defendants is not based on an approximation of party strength but rather on

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[24] Joint App. at 182a-85a.

ideological considerations. As defendants state in their brief: [35]

> Political treatment of states on a state-to-state basis, without regard to their wealth, size or population (or alleged party strength) is practically an American tradition. Each state, no matter its size, is represented by two United States Senators, each state is represented by its own distinguishable delegation within the Electoral College and each state is granted only one vote in the United States House of Representatives in the event of a failure by the Electoral College to vote a majority for any single presidential candidate. In a word, each state is sovereign, requiring even-handed and equal treatment in the Federal System. Defendants submit that the recognition of these facts, coupled with the element that identical achievements [in a state party receiving enough Republican votes to win the electoral votes of its state] deserve identical rewards, constitutionally justifies the inclusion as a part of a presidential bonus formula [a uniform bonus].

This argument is buttressed by the assertion that such recognition of individual states and their "achievements" is a non-justiciable accommodation of competing ideological interests.[36] Implicitly the Republican Party claims the

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[35] Brief for National Republican Party and Republican National Comm., at 46. *See also* A. Bickel, Reform and Continuity 4-21, 54-62 (1971). To be sure, Professor Bickel has inveighed against the "victory bonus", at least when the issue was abolition by the party itself. *Id.* at 74-75.

[36] *Id.* at 23-24:

> Plaintiffs have burdened this case with statistics and other irrelevant facts designed to create a misunderstanding of the basic nature and function of a national political party convention. . . . [Delegates] to a national political convention . . . deliberate and decide questions concerning the party's ideology as it is to be embodied in the platform, the convention's order of business, delegate seating challenges, delegate apportionment, . . . etc. De-

authority to create for its party an analogue of the Connecticut Compromise whereby smaller Republican states are guaranteed "a say" in Party affairs and large states are given proportionately more of the amount of delegates to be apportioned on the basis of population. A complete evaluation of these contentions requires a consideration of the nature of the one person-one vote principle and its relation to a major political party.

## IV. The Invalidity of Territorial Discriminations for Ideological Reasons

The argument advanced by the defendants is exactly that which was rejected in *Reynolds v. Sims*, 377 U.S. 533

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> fendants submit that the resolution of these questions, as well as others, require political considerations, and are properly beyond the purview of the Courts. . . . So varied are the interests to be accommodated at a national political convention, that it is the party itself which should (and historically has) resolved political determinations, including delegate apportionment relating to these varied and interwoven interests.

A subsidiary justification offered by the defendants and considered by the District Court is that the victory bonus is designed to spur party effort by promising the reward of a greater "say" in party affairs. This justification seems wholely irrational since it does nothing to reward exceptional party effort in a heavily Democratic state which almost produces a Republican victory while "rewarding" a sub-par effort in a heavily Republican state. Furthermore, there seem to be many less drastic and better tailored means to achieve this goal of spurring party effort. *See* page 23 & note 31 *supra*. For example, it seems that allocation of party funds, scheduling of party leaders, funnelling of party patronage and allocation of leadership positions would accomplish this task much more directly and with no damage to the one person-one vote principle. More than this, the justification of spurring party effort seems mostly a cover for an allocation based on ideological concerns. The real spur to party effort is the implicit recognition that the party orders its political process in a way that accentuates the power of certain territorial interests and thereby is a self-fulfilling prophesy that the right people are being rewarded.

(1964) and *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713 (1964). Indeed, defendants' argument virtually tracks the dissents of Justice Harlan in *Reynolds* and Justice Stewart in *Lucas*.[37] The essence of this argument is that deviations from the one person-one vote standard are permissible since they represent a political balance of economic, social, historical and ideological factors. Such a balance is obviously not for the Court, as everyone must agree. The process of apportionment so viewed is simply an extension of *election victory*: since the people elect persons representing definable economic, social, historical and ideological positions, they may similarly elect to give a disproportionate (in terms of a hypothetical one person-one vote standard) weight through an increased number of political representatives to the victorious positions. This view of the defendants' argument is perfectly illustrated by *Lucas* which involved an attempt to malapportion the Colorado legislature through a popular referendum.

The Court understood this argument when it decided *Reynolds* and it rejected it. It rejected it because voting rights are "preservative of other basic civil and political rights."[38] and because, in language which is now immortal:[39]

> Legislators represent people not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government . . ., the right to elect legislators in a *free and unimpaired fashion* is a bedrock of our political system. It could hardly be gainsaid that a constitutional claim had been as-

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[37] *See* 377 U.S. at 622-24 (Harlan J. dissenting); 377 U.S. at 749-51 (Stewart J. dissenting).

[38] 377 U.S. at 562, *citing* Yick Wo. v. Hopkins, 118 U.S. 356, 370 (1881).

[39] 377 U.S. at 562 (emphasis added).

> serted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting. . . . And if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five or 10 times . . . while voters living elsewhere could vote only once.

The center of this reasoning is that the right to an equal vote is the *starting place* for battle over the proper weight to be given economic, social, historical and ideological interests in the legislative process; the right to vote is not merely another arena in which those various interests may assert their power. The right to an equal vote serves to prevent an entrenchment of any one group of interests to the exclusion of others, even if freely chosen in the most democratic fashion,[40] because such

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[40] *See* Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 736-37 (1964). It is for this reason that Irish v. Democratic-Farmer-Labor Party of Minnesota, 399 F.2d 119 (8th Cir. 1968) was wrongly decided. *See also* Bates v. Edwards, 294 So.2d 532, 537-38 (La.), *appeal dismissed*, 95 S.Ct. 29 (1974) The court's reliance in that case on Sailors v. Board of Educ., 387 U.S. 105 (1967) and Fortson v. Morris, 385 U.S. 230 (1966) is misplaced. In *Sailors*, a county school board was held to perform only "administrative" duties, and was therefore outside the scope of the one person-one vote principle. *Compare* Hadley v. Junior College Dist., 397 U.S. 50, 53-57 (1970) *with* Seergy v. Kings Co. Republican Co. Comm., 459 F.2d 308, 315 (2d Cir. 1972). *Fortson* is even more wide of the mark, since it involved the election of a governor by a concededly malapportioned legislature. Thus there was no equitably apportioned election districts to begin with that might justify the denial of the one person-one vote standard at a subsequent "level" of political choice. *Fortson*

an entrenchment in the very process of political choice is contrary to the democratic ideal. In each election, warring interest groups must theoretically re-contest the balance struck at the last election. In this manner, democratic change is permitted if such change is desired. This concept was easily recognized in the first reapportionment cases which presented the most horrendous examples of entrenchment of certain interest groups. As Justice Clark forcefully stated in regard to the Tennessee malapportionment: "[The] legislative policy has riveted the present seats in the Assembly to their respective constituencies, and by votes of their incumbents a reapportionment of any kind is prevented. The people have been rebuffed at the hands of the Assembly. . . ."[41] The Supreme Court did not think even a democratic choice in the present should be permitted to begin such an entrenchment and so held in *Lucas*.

But the policy against entrenchment of political interests of whatever shape or form, liberal or conservative, desirable or not from any point of view, does not extend to the *results* of an election,[42] nor to the type of district

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simply will not bear an interpretation that indirect selection of candidates is outside the scope of the one person-one vote principle. *See* Note, Bode v. National Democratic Party: *Apportionment of Delegates to National Political Conventions*, 85 HARV. L. REV. 1460, 1467 (1972). Reduced to essentials the criticism of the one person-one vote prinicple implicit in *Irish* is that if a person's vote is counted fairly and not nullified, it does not matter how that vote is weighted by malapportionment of the political district in which it is counted. But we do not see how one can accept the latter-without the former. The excerpt from *Reynolds* quoted in the text demonstrates this proposition clearly.

[41] Baker v. Carr, 369 U.S. 186, 259 (1962) (Clark, J. concurring).

[42] *See* Whitcomb v. Chavis, 403 U.S. 124, 153-55 (1971).

in which a representative is to stand,[43] nor, indeed, to the amount of votes needed to carry a particular measure.[44] The policy against entrenchment operates solely to insure "full and effective participation by all citizens";[45] it does not operate to control what ideological shading or interest group balance that citizen participation produces. The one person-one vote standard is simply the starting line which all interest groups must toe. So viewed, the one person-one vote standard is implicit in the concept of a democracy, as necessary to representative government as the concept that individuals may not be disenfranchised because of their social or economic views and as such a constitutional principle of the highest order.[46]

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[43] *See id.* at 141-48 and cases cited. The exception to this rule is when a particular kind of district operates to dilute or cancel the voting strength of racial or political elements. *See* White v. Regester, 412 U.S. 755, 765-70 (1973); Reese v. Dallas Co., 505 F.2d 879, 887-88 (5th Cir. 1974) (*en banc*); Cousins v. City Council of the City of Chicago, 503 F.2d 912, 922-24 (7th Cir. 1974).

[44] *See* Gordon v. Lance, 403 U.S. 1 (1971). These results follow from the recognition that the one person-one vote standard operates to ensure equal access and not majority rule. It is for this reason that Justice Stewart was mistaken when he argued that the holding in *Lucas* outlawed election districts in favor of elections at large, 377 U.S. at 750 & n.12, and Professor Bickel was mistaken when he argued that *Reynolds* required a majority vote on all issues. *See* A. Bickel, The Supreme Court and the Idea of Progress 152-53 (1970). Indeed, *Lucas* and Hunter v. Erickson, 393 U.S. 385 (1969) make this point clear.

[45] 377 U.S. at 565.

[46] This principle is grounded in the Constitution in the following manner. Article I, § 2 of the Constitution requires that Members of the House of Representatives be chosen "by the People of the several States" and "shall be apportioned among the several States . . . , according to their respective numbers . . . ." In Wesberry v. Sanders, 376 U.S. 1, 7-18

With this understanding of the one person-one vote standard, the invalidity of a victory bonus scheme either as an approximation of party strength or as an ideological commitment to state sovereignty becomes apparent. In

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(1964) this language was interpreted to mean that Congressional apportionment shall be on the basis of the one person-one vote standard. Article II, § 1, cl. 2 ties the number of presidential Electors to the number of Members of the House and Senate to which each state is entitled in the Congress and thus Wesberry v. Sanders, *supra*, by direct implication requires that presidential Electors be chosen on the basis of one person-one vote to the extent the Electors are selected to correspond with a states' delegation in the House of Representatives. We hold here that the command of Article I, § 2 also applies to the apportionment of delegates to major party national conventions held for the purpose of choosing a candidate for the office of President. Those delegates, we hold, are to be apportioned largely as the Electors are apportioned. The implicit holding of *Reynolds v. Sims* is that the Fourteenth Amendment—and, indeed, the Fifteenth Amendment—incorporates the same standard as Article I, § 2. *Compare* Article I, § 2, *with* the language of § 2 of the Fourteenth Amendment. Thus, it makes no difference whether the actions of the Republican Party are conceptualized as "state action" or Federal government action. *See* note 6 *supra*.

Our extension of the holdings of *Wesberry* and *Reynolds* to major, national political parties requires us to consider and reject one criticism of those holdings. This criticism is that those decisions are "unrealistic" since legislative policy is not really made in elections. Rather, legislative policy is forged in the day-to-day process of government, a process to which some organized groups have more access than others. *See* A. Bickel, Politics and the Warren Court 182-86, 188-90 (1965). As further evidence of the "unrealistic" nature of the reapportionment decisions, we might also note that voters with greater wealth have at present greater access to the political process than less wealthy voters, that elections often do no more than indicate "yes" or "no" to existing policies and further that elections are at times won or lost on slogans and not on rational choice of policy. We might even assume for purposes of this decision that elections are entirely irrelevant to the formation of public policy in the actual operation of our system of government. But it does not follow from these

either case, the victory bonus operates to entrench the prevailing powers of the Republican Party through a territorial discrimination that weights the votes of some actual and potential Republicans more than others. As

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assertions, that the reapportionment decisions were mistaken. Nor does it follow from the rejection of majoritarianism as the root-principle of the reapportionment decisions in Fortson v. Morris, 385 U.S. 230 (1966) and in Gordon v. Lance, 403 U.S. 1 (1971) that reapportionment doctrine is meaningless. We note that courts may only prevent government restrictions on equal access to the electoral process and may not implement affirmative duties to be placed on the government to insure equal access for all citizens. *Cf.* Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35-39 (1973). This passive role imports by its nature some degree of unreality; but it is an unreality which has not been deemed so anachronistic as to undermine any efforts by courts to protect individual rights. Furthermore, to attach to reapportionment doctrine an asserted goal to reform state legislatures, increase public access, perfect majority rule, or whatever, we think, entails a misunderstanding of that doctrine and of the one person-one vote principle. "The popular approval of the one man [sic], one vote doctrine demonstrates that the Court and the public shared a premise quite beyond any expectation of practical results from the reallocation of power—the premise of equality of citizenship as a *constitutive principle* in American politics for its own sake, as a means to no 'realistic' end other than a renewed sense of the principled legitimacy of the whole political enterprise." Linde, *Judges, Critics and the Realistic Tradition,* 82 YALE L.J. 227, 232 (1972).

The one person-one vote principle is thus based upon a democratic faith which gives legitimacy to the governmental decision-making process. The faith underlying this principle of democratic legitimacy may well be unrealistic and simplistic, but if it is to be discarded for this reason, it would require a more thorough wrenching of our national ideals than anyone seems willing to precipitate. The law gives this faith a coercive effect not because of the populist beliefs of a majority of the Supreme Court but because the people them-

such, the victory bonus is, as its name suggests, directed to the past; it does not provide a starting line for the future. Of course, the Republican Party, equitably apportioned, may choose whatever balance of social, economic, historical or ideological interests it thinks fit to adopt. Nothing in the one person-one vote principle prevents it from doing so. But that choice must be one made by all potential and actual Republicans and not those which are given additional strength solely because of a balance struck in the past.

It remains to be seen whether any reasons exist for exempting a national and major political party from

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selves hold this belief. If the people are willing to accept a system of government based on some other constitutive principle, they are free to do so. But it would be difficult to argue, we think, that they have done so already. The democratic process is not so susceptible to rational understanding that a definition of its mechanics can proceed on a purely instrumental basis. Rather the faith of the people as embodied in shared principles which give legitimation to the governmental process provides the definition of American democracy. We think the one person-one vote principle is at the heart of that legitimation.

One may profitably compare the faith represented by the one person-one vote principle with the parallel faith enshrined in the First Amendment. The link between the two is found in the legal treatment of political associations other than major political parties. *See* the discussion in Storer v. Brown, 415 U.S. 724, 756 (1974) (Brennan J. dissenting) and cases cited; cases cited note 18 *supra*. In both cases the legal order presumes that over the long run free expression of political views and freedom to associate for the expression of those views will produce within the democratic process the most wise choices of national policy. Restrictions on the weight to be given one person's vote are—no less than laws restricting litigation activities in support of the right to vote or restricting access to the ballot—violative of this legal order. *See generally* A. Meicklejohn, Free Speech and its Relation to Self-Government (1948); Meicklejohn, *The First Amendment is an Absolute*, 1961 SUPREME COURT REV. 245.

this principle. We turn first to the most insistent argument the defendants present—that this principle infringes upon the ideological choice of a political association in contravention of the First Amendment and in opposition to the intimation by the Supreme Court in *O'Brien* and the holding of *Cousins v. Wigoda*. However, we hold above that the apportionment of delegates is not a subject mete for control by major party ideology. For reasons expressed on page 35 *infra*, this holding is consistent with the First Amendment. The ideological coloration of the delegates once equitably apportioned, as determined by the voters or by the party, is a distinct issue. This is clearly recognized in the reapportionment cases and inherent in their principle as that principle has been elucidated above. *O'Brien* and *Cousins* dealt with the character of the delegates and thus dealt with "internal party affairs" in a manner clearly not contemplated by our reasoning in this case.[47] *Cousins* was ex-

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[47] *See* note 11 *supra*. The ideological composition of a party, as that composition is reflected either in delegate selection procedures (*i.e.* slate-making procedures, *see* Cousins v. Wigoda, 95 S.Ct. 541 (1975) or proportional vs. winner-take-all primaries, *cf.* Delaware v. New York, 385 U.S. 895 (1966); A. Bickel, *supra* note 35, at 21 & n. 12, or in loyalty oaths, *see* Ray v. Blair, 343 U.S. 214 (1952)), is a result of a particular definition of party support. The one person-one vote principle, as explicated herein, requires only that the party support once delineated, be fairly apportioned.

There is, to be sure, some overlap between the process of apportionment and the process of determining the ideological orientation of the party, an overlap which lies in the process of ascertaining actual and potential party strength. As indicated in note 58 *infra*, this process of ascertaining party strength is largely non-justiciable itself and there is thus no conflict between the position that internal party affairs are non-justiciable and that apportionment is not. Of course, there is a clearly justiciable distinction between a true attempt to ascertain party strength in terms of actual and potential party adherents and an attempt to entrench certain party interests which have been successful in past disputes over the ideological orientation of the party.

pressly limited to cases where "the convention itself [was] the proper forum for determining intra-party disputes as to which delegates [should] be seated." [48] We conclude that the District Court correctly distinguished *O'Brien*.[49]

A second concern is whether our reasoning is consistent with *Bode* and *Georgia* to the extent those cases held that a party may attempt to approximate party strength in apportionment of delegates. The argument is that since we approved apportionment schemes based in part on past performance, we implicitly approved recognition of past success in the apportionment of delegates. We disagree. Both *Georgia* and *Bode* hold only that the relevant constituency upon which the one person-one vote standard is to be applied at a party convention is not the total population. More important, *Bode* recognizes that constituency can be measured by counting potential as well as past Democratic voters. The project in determining party strength is thus not based on past "success" in winning votes by a particular political program alone but rather is an attempt to loosely define the probable constituency for the future, an attempt which requires some consideration of past voting patterns. The difference between this sort of attempt and a victory bonus scheme is obvious enough: the victory bonus excludes consideration of that part of the Republican constituency which resides in a state which did not vote Republican in the Electoral College. The only relevant constituency under the victory bonus is not the potential Republican votes that may exist but only the past Republican votes in states which voted Republican in the Electoral College.

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[48] 95 S.Ct. at 549 *citing* O'Brien v. Brown, 409 U.S. 1, 4 (1972).

[49] *See* page 10 & n. 11 *supra*.

A further argument is that the Electoral College system, by recognizing a unit voting scheme, and Article II of the Constitution, by adopting the Connecticut Compromise, explicitly permit a malapportionment based on recognition of state sovereignty and on recognition that only Electoral College votes are the "constituency" of a national political party. We held in *Bode* and reaffirm here that the Electoral College principle does permit a malapportion of delegates in regard to either total population or party vote. However, it is quite a step beyond this to calculate the Republican constituency on the basis of Electoral College votes. We think in this day and age the Republican constituency consists of Republican voters and not Republican Electors. The modern adoption of popular sufferage requires no less. Calculation of party strength, both actual and potential, thus must be directed toward individual voters.

As to the use of the analogue to the Senate to permit malapportionment of delegates to a political party, we do not think a political party can be assimilated to a bicameral legislature. The party acts to elect a President, not the Senate, and in the actual election under the Electoral College system the only deviation from one person-one vote is the uniform grant of two Electoral votes representing the state's Senators. That marginal increase is permitted by *Bode*. We do not think any greater deviation can be permitted simply by analogy to the United States Senate.[50] Whether the principle of giving smaller states a sufficient "say" in the convention may permit a relatively minor deviation from the one person-one vote standard, such as was permitted in *Mahan v. Howell*, 410 U.S. 315 (1973), is a question we need not decide on the record in this case.

A final argument for distinguishing a major, national political party for purposes of applying the one person-one vote standard is that a political party is not ex-

[50] *Cf.* Wesberry v. Sanders, 376 U.S. 1 (1964).

clusive. The gist of this argument is that if a citizen is denied equal access to the Republican decision-making process through malapportionment, he or she may simply join another party or vote for another party: that is, as long as there is equal access at the general election, the one person-one vote standard is fulfilled and we need not be concerned with the operations of the party.[51] This argument would have great force if there were a truly free marketplace in political parties at the general election. However, such is not the case. As discussed in regard to "state action", the narrowing process utilized by the major political parties effectively limits the range of choice at and, indeed, the importance of the general election. "The convention [of major political parties] serves the pervasive national interest in the selection of candidates for national office . . . . The paramount necessity for effective performance of the convention's task is underscored by Mr. Justice Pitney's admonition 'that the likelihood of a candidate succeeding in an election without a party nomination is practically negligible . . . . As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made.' " [52] For better or worse, the major political parties are an integral part of the election process and if the one person-one vote standard is to apply at the general election, it must also apply to the primary process to be truly effective.[53]

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[51] This argument might be much more persuasive in the context of apportionment of committee people for the internal management of a political party. *See* Seergy v. Kings Co. Republican Co. Comm., 459 F.2d 308, 313-14 (2d Cir. 1959); *cf.* Note, *supra* note 40, at 1469-71.

[52] Cousins v. Wigoda, 95 S.Ct. 541, 549 (1975), *quoting* Newberry v. United States, 256 U.S. 232, 286 (1921) (Pitney, J. dissenting). *Cf.* Thompson v. Evening Star Newspaper Co., 394 F.2d 774, 776 (D.C. Cir.), *cert. denied*, 393 U.S. 884 (1968).

[53] *Cf.* Gray v. Sanders, 372 U.S. 368 (1968). *See also* Storer v. Brown, 415 U.S. 724, 735-37 (1974) (compelling interest in

We might conclude our discussion by further reference to the concept of justiciability. We have held above that courts may intervene into the affairs of major, national political parties to insure that delegates to their conventions are apportioned fairly, on the basis of the one person-one vote standard as modified by *Bode* and *Georgia*. This limited judicial intervention is no less manageable than judicial intervention into apportionment at the general election. Since the holding is that the principle underlying the one person-one vote standard is not a subject mete for party ideology, there is no judicial involvement in party ideology. This judicial intervention protects only the process of political choice not the results. Whether the process has any effect on the results is an interesting but to us irrelevant question. We would reach a similar result even if the one person-one vote standard changed nothing.

This limited intervention to insure equal participation is consonant with the institutional structure of the First Amendment and, indeed, forwards its underlying purposes. The right to an equal vote, the principle enunciated in the reapportionment decisions and which we apply here, is itself rooted in the First Amendment or, put another way, the First Amendment is designed to make the right to vote effective and to permit its intelligent exercise.[54] It can hardly be deemed a rational development of First Amendment doctrine to dilute the vote in the name of the freedom whose exercise is designed to make the vote more effective, at least when the entity which attempts to dilute the vote is colored with state action.[55] One may

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maintaining the duopoly status of major political parties to increase political stability).

[54] On the relation of the one person-one vote principle and the First Amendment, *see* note 46 *supra*. *See also* sources cited notes 17-20 *supra*.

[55] We are careful to note that the finding of state action applies only to the operations of the party in regard to ap-

conceptualize the matter as a reconciliation of the First Amendment with other sections of the Constitution which establish a democratic form of government, as Professor Meicklejohn appears to do, or determine the principle of the reapportionment decisions to be a "compelling" national interest which overrides the freedom of association of national political parties.[56] In either case, the First Amendment as it has developed in the numerous decisions protecting the rights of political associations does not prevent vindication of the commanding constitutional

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portionment of delegates or the denial of the right to an equal vote at a nominating convention. *See* pp. 11-13 *supra*. On the effect of a finding of state action on First Amendment rights, *see* Columbia Broadcasting Systems, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139 (1973) (Stewart J. concurring); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961).

[56] In Cousins v. Wigoda, 95 S.Ct. 541, 549 (1975) the Court noted that national political conventions serve a "pervasive national interest" and also noted the fundamental character of the right to an equal vote, citing Reynolds v. Sims, 377 U.S. 533, 562 (1964). *Cf.* Thompson v. Evening Star Newspaper Co., 394 F.2d 774, 776 (D.C. Cir.) *cert. denied*, 393 U.S. 884 (1968). *Cousins* holds only that a *state* has no compelling interest in regulating intra-party affairs and does not hold that there is no *national* compelling interest which could justify regulation of apportionment. A finding that the nation has a compelling interest in enforcing the reapportionment decisions on a political association seems virtually required by the reasoning of Storer v. Brown, 415 U.S. 724 (1974) which holds that states have a compelling interest in enforcing a narrowing process to simplify voter choice at a general election. If states have such a compelling interest, which is partly responsible for the finding of state action in the apportionment of delegates to national political conventions and which therefore calls up a need for fair apportionment in order to protect the right to vote against dilution, it must certainly follow that the state, or the nation, has a compelling interest in enforcing the reapportionment principle upon major political parties.

principle of the reapportionment decisions. We, therefore, have no difficulty concluding that this judicial intervention is fully consistent with concepts of justiciability. Whether a different result would obtain if a different type of intervention were attempted is beyond the scope of this case.

## V. Remedy and Attorneys Fees

Plaintiffs present us with two alternative plans for the apportionment of the 1976 Republican Convention delegates. They request that this Court either order the defendants to implement one of these plans or order that the defendants take timely action to adopt a revised formula and submit the revised formula to the District Court for approval before effectuation. We first note that "primary jurisdiction" over reapportionment lies with the body being reapportioned.[57] The policies underlying the doctrine of justiciability and state action require this result. Since the defendants proceeded in good faith to obtain a judicial determination of the validity of their current reapportionment plan and have not had an opportunity to comply with an adverse judgment, we must therefore refrain from implementing any plan suggested by plaintiffs until the defendants have had a reasonable opportunity to comply with our mandate.[58] We similarly do not think that implementation of this plan should be conditioned on approval by the District Court. If the defendants fail to comply with

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[57] *See* White v. Weiser, 412 U.S. 783, 795 (1973).

[58] Reynolds v. Sims, 377 U.S. 533, 586 (1964). *See* Ely v. Klahr, 403 U.S. 108 (1971). The need to provide this opportunity to comply is made doubly important in the context of major political parties by the difficulties of defining potential party supporters. *See* A. Bickel, *supra* note 35, at 62-68; Note, Bode v. National Democratic Party: *Apportionment of Delegates to National Political Conventions*, 85 Harv. L. Rev. 1460, 1469-75 (1972).

the mandate of this Court, they will, of course, be subject to further proceedings on the basis of our judgment. If the defendants implement a new plan not controlled by our judgment here but which plaintiffs consider raises new constitutional issues, the plaintiffs may file an appropriate complaint in the District Court and preliminary relief may be granted if permissible under the applicable precedents. We have not had sufficient experience with the difficult issues in this area of law to order that the defendants comply with the standards approved in *Bode* and *Georgia*. We think the defendants should have another opportunity to consider the constitutionality of their apportionment plan. As to the request for timely reconsideration, the defendants have not shown any propensity for delay in compliance with the mandate of the District Court and we would not infer such a course of action. If revision of the formula for the 1976 convention is not forthcoming within a reasonable time after entry of judgment, plaintiffs may move the District Court for appropriate relief.

The District Court declared that the use of uniform victory bonuses was improper and enjoined their use in the apportionment of delegates to the 1976 convention. We affirm that order and further declare that use of proportional victory bonuses is illegal and remand the cause with instructions to enjoin the use of such victory bonuses in the apportionment of delegates to the 1976 Republican Convention.

Plaintiffs moved the District Court for allowance of attorneys fees and certain expenses, a motion which the District Court denied without opinion. Plaintiffs assert three grounds in support of their argument for allowance of fees: (1) that the defendants have acted in bad faith; (2) that the plaintiffs' suit confers a benefit on an ascertainable class and the award of fees will serve to spread the costs of litigation among the beneficiaries;

and (3) that the plaintiffs have acted as private attorneys-general and vindicated a policy which Congress considered of the highest priority.[59] We do not think the first two grounds justify an award of fees. The defendants have not acted in bad faith in refusing to accept the District Court decision as final and instead insisting on their right to appellate review.[60] Defendants are not correct in asserting that the plan adopted at the 1972 Republican Convention was a good faith effort to comply with the District Court's first order, but they were under no duty to comply with that order since it was stayed. On proceedings in regard to the second complaint, defendants were entitled to maintain that the District Court was mistaken in its view of the uniform bonus and thereby perfect the issue for appeal. Absent Supreme Court review of this decision, further refusal to comply with the judgment of the District Court or refusal to comply with our judgment here may be viewed in a different light. As to the second asserted ground, it is not applicable where imposition of attorneys fees on the defendants will not spread the costs of litigation proportionately among the beneficiaries.[61]

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[59] These three grounds are set out in Wilderness Soc'y v. Morton, 495 F.2d 1026, 1029 (D.C. Cir.), *cert. granted sub nom.* Alyeska Pipeline Service Co. v. Wilderness Soc'y, 95 S.Ct. 39 (1974).

[60] We conclude that defendants' legal claims were manifestly reasonable and advanced in good faith. *Id.*

[61] *Id.* Here the costs of litigation will be borne by those who contribute money to the Republican Party. There is no showing—and we seriously doubt there could be such a showing—that those individuals comprise the class of beneficiaries of plaintiffs' successful legal claims. This case is thus distinguishable from Hall v. Cole, 412 U.S. 1 (1973) where the entire union membership both benefited from the successful legal claim and had contributed to the union treasury which was the source of the payment sought.

As to the third asserted ground, we have no doubt that the one person-one vote standard is, through operation of 42 U.S.C. § 1983 (1970), a Congressional policy of the highest priority.[62] There is a good deal of authority for the proposition that this fact alone justifies the award of attorneys fees.[63] However, we agree with the Fourth Circuit that the logical extension of these holdings is that virtually all constitutional claims entitle the proponent to attorneys fees.[64] We are unsure what, if any, limitations should be placed on these holdings. We are satisfied, however, that the beginning point for analysis is our recent decision in *Wilderness Society v. Morton*, 495 F.2d 1026 (D.C. Cir.), *cert. granted sub nom. Alyeska Pipeline Service Company v. Wilderness Society*, 95 S.Ct. 39 (1974). Since the District Court did not have the benefit of this opinion when it ruled on plaintiffs' motion and since it must exercise its equitable discretion in deciding upon the amount of fees, if any, to be granted, we think the better course is to remand this issue to the District Court for further consideration.

*Affirmed in Part, Reversed in Part And Remanded With Instructions*

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[62] *See* Fairley v. Patterson, 493 F.2d 598, 606-07 (5th Cir. 1974); Sims v. Amos, 340 F. Supp. 691, 694-95 (M.D. Ala.), *aff'd mem.* 409 U.S. 942 (1972). *Cf.* Brandenburger v. Thompson, 494 F.2d 885, 888-89 (9th Cir. 1974).

[63] *See* Gates v. Collier, 489 F.2d 298, 301 n.1 (5th Cir. 1973) and cases cited; cases cited note 62 *supra*. *Compare* Fowler v. Schwartzwalder, 498 F.2d 143, 145-46 (8th Cir. 1974); Sosa v. Fite, 498 F.2d 114, 121-22 (5th Cir. 1974).

[64] Bradley v. School Bd. of City of Richmond, 472 F.2d 318, 327-31 (4th Cir. 1972), *rev'd on other grounds*, 416 U.S. 696 (1974). The success of the litigation may be one factor which limits the award of fees. *See* Cousins v. City Council of the City of Chicago, 503 F.2d 912, 924-25 (7th Cir. 1974).

DANAHER, *Senior Circuit Judge, dissenting*: The unprecedented position here assumed by the present majority goes beyond anything I might have supposed this court would undertake to do. Granted that the nominal defendants are the National Republican Party and Republican National Committee, herein, Defendants, the views announced and the results mandated will apply equally to the National Democratic Party and to the Democratic National Committee. My colleagues concede that they

> have not had sufficient experience with the difficult issues in this area of law to order that the defendants comply with the standards approved in *Bode* and *Georgia*. We think the defendants should have another opportunity to consider the constitutionality of their apportionment plan.[1]

The defendants additionally have been warned, that if they "fail to comply with the mandate of this Court, they will, of course, be subject to further proceedings on the basis of our judgment."

So, we find two judges here undertaking to tell tens of thousands of citizen-voters of the United States that they are to conform to the judges' theory of how delegate strength at the party nominating level is to be recognized and that the political parties must conform their repre-

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[1] "Georgia" refers to this court's opinion in Georgia v. National Democratic Party, 145 U.S.App.D.C. 102, 447 F.2d 1271 (1971), *cert. denied*, 404 U.S. 858 (1971). Bode and other national committeemen and national committeewomen of various states had sought to intervene, but the Georgia court afforded the Bode appellants status only as amici.

"Bode" refers to our opinion in Bode v. National Democratic Party, 146 U.S.App.D.C. 373, 452 F.2d 1302 (1971), *cert. denied*, 404 U.S. 1019 (1972).

In both cases we had sustained the position of the National Democratic Party.

sentation plans to an apportionment scheme yet to be devised for the conduct of their nominating program.

In the course of this very litigation, The Ripon Society, Inc. et al., herein, Plaintiffs, filed in the Supreme Court their memorandum in opposition to a stay of the injunction of the district court. The Court then was told:

> The precise question of the application of the Equal Protection Clause to formulas for apportionment of delegates to national conventions of major political parties has not previously been before this Court except in the denial of certiorari in *Georgia* and *Bode*. Although the question here presented would be new to this Court, novelty alone is not sufficient to require the conclusion that the District Court was in error in holding that the controversy is appropriate for decision by a federal court, or that the Court of Appeals erred in declining to grant the stay sought by the Committees and the Delegate.

## I.

Who has brought about this litigation? Not the Third Ward Republican Club of Madison, Wisconsin, nor the Republican State Central Committee of Arizona. No, it is a private corporation calling itself The Ripon Society, Inc.[2] It is entitled to no relief on its own account, it has no vote. It has, within the ambit of its own control, authorized this action, listing as individual plaintiffs some nine voters of the District of Columbia, California, Illinois, Indiana, Massachusetts, Minnesota, New Jersey,

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[2] Of record we find the affidavit of Ripon's Executive Director who asserts that the purposes of Ripon are:

> To stimulate creative discussion within the American political system leading to a fuller understanding of domestic and international problems, and to engage the talents and energies of thinking young people in the cause of constructive Republicanism.

New York and Pennsylvania. One of these named plaintiffs has filed an affidavit of record that he is indeed a Republican.

None of the individual plaintiffs has been denied an opportunity to become a delegate from his own state to the Republican National Convention to be convened in 1976. It does not appear that any party action has been taken in any state to choose delegates to that convention. If there be a certain degree of wonderment as to how possible action at that convention in seating its delegates can justiciably harm these plaintiffs, we may try to find an answer in what my colleagues are saying.

> We have held above that courts may intervene into the affairs of major, national political parties to insure that delegates to their conventions are apportioned fairly, on the basis of the one person-one vote standard as modified by *Bode* and *Georgia*. This limited judicial intervention is no less manageable than judicial intervention into apportionment at the general election. Since the holding is that the principle underlying the one person-one vote standard is not a subject mete for party ideology, there is no judicial involvement in party ideology. This judicial intervention protects only the process of political choice not the results. Whether the process has any effect on the results is an interesting but to us irrelevant question. We would reach a similar result even if the one person-one vote standard changed nothing. (Slip op. 35).

It is not to be doubted that in state-ordered *elections* for state offices at whatever level, a fair and equal right to vote may, and often does require representative apportionment. It is equally so when commanded by *state legislation* concerning some aspects of party representation in state-recognized party units. *See, e.g., Seergy v. Kings County Republican County Committee*, 459 F.2d 308, 313 (2 CA 1972). The "one man-one vote" concept

*commandingly*—and properly—must obtain in a *general election* for the office of President and Vice President, the only national offices for which the citizens of our great nation are entitled to vote, directly.

But we are not here and have not been concerned about a general election; we are interested in the composition of a body of party representatives who for generations have organized their own nominating mechanism.[3]

We are talking about national political parties whose adherents under procedures of their own formulation will in 1976 prescribe where they will meet, when they will meet, and how they will compose an entity to select prospective nominees as their standard bearers. Thereupon and through those candidates the respective parties will seek popular support for programs of government deemed by the conventions to be desirable to achieve as nearly as possible the general welfare of the nation and of its citizenry.[4]

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[3] We may at once set aside cases upon which the Ripon Plaintiffs rely such as Reynolds v. Sims, 377 U.S. 533, 565 (1964), where the court itself explained that it was discussing the one man-one vote principle thus: every citizen "has an inalienable right to full and effective participation in the political processes of his State's *legislative bodies*", and "Full and effective participation by all citizens in *state* government requires, therefore, that each citizen have an equally effective voice in the *election* of members of his *State legislature*." (Italics added.)

We have here no racially motivated exclusion of voters—no weighting of primary votes in favor of sparsely settled counties. *Cf.* Bode v. National Democratic Party, *supra*, 146 U.S.App.D.C. at 377-78, 452 F.2d at 1306-1307.

[4] The Washington Post for Monday, December 9, 1974, reports current activities in this area of both major parties. See page 1 "Democrats Look to 1976," continued in column 1,

## II.

It appears here that the Republican National Convention in 1972 had adopted by a vote of 910 to 434 the party rule now in issue relating to the apportionment of delegates to the Convention to be held in 1976. That action had followed hearings and debate before the Temporary Committee on Rules of the 1972 Convention. Various formulae had long since been submitted to Party adherents for evaluation. Majority and minority reports were considered by the Temporary Rules Committee. The Republican National Committee finally approved the majority report favoring Rule 30 now under challenge. After the views substantially espoused by the Ripon Plaintiffs had been rejected, resort was had to the courts.

One can find himself recalling what was said by the Court, in different context to be sure, but nevertheless apt in principle:

> Arguably the losing candidates' supporters are without representation since the men they voted for have been defeated; arguably they have been denied equal protection of the laws since they have no legislative voice of their own. This is true of both single-member *and* multi-member districts. But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called "safe" districts where the same party wins year after year. *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971).

The foregoing once again emphasizes the propensity of losers to seek from a court what they have failed to gain through available mechanisms. The Ripon Plaintiffs persuaded the District Court to enjoin the Party from adopting at the 1972 Convention a formula for

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page 3; again, "GOP Seeks 'Positive Action'," continued in column 1, page 8.

the apportionment of delegates to the 1976 Convention which would allocate a uniform number of bonus delegates to states qualifying for them, quite apart from other factors.[5] A divided panel of our court denied a stay of the district court's order. Mr. Justice Rehnquist, however, granted the stay, *Republican Committee v. The Ripon Society, Inc.*, 409 U.S. 1222 (1972), even quoting as a basis

> the probability that the [District Court] was in error in holding that the merits of these controversies were appropriate for decision by federal courts.

Recognizing, of course, that the issue before him involved a delegate allocation dispute, he nevertheless took into account the credentials dispute which was involved in *Brown v. O'Brien*, 152 U.S.App.D.C. 157, 469 F.2d 563 (1972).[6] In that case a stay also had been ordered, *O'Brien v. Brown*, 409 U.S. 1 (1972) with comment, *id.* 409 U.S. 4, as follows:

> We must also consider the absence of authority supporting the action of the Court of Appeals in intervening in the internal determinations of a national political party, on the eve of its convention, regarding the seating of delegates. No case is cited to us in which any federal court has undertaken to interject itself into the deliberative processes of a national political convention; no holding of this Court up to now gives support for judicial intervention in

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[5] These Ripon Plaintiffs have been arguing in effect that the Republican plan of delegate allocation will constitute a debasement of the franchise or the dilution of the weight of the vote of a citizen. They argue a right to equal protection, but in present context we may ask "Equal to what?"

[6] A companion case to Brown v. O'Brien was Keane v. National Democratic Party, 152 U.S.App.D.C. 157, 469 F.2d 563 (1972). Not only did the Supreme Court stay the operative effect of Brown, but by order, 409 U.S. 816 (1972) the Court vacated our judgment in Keane.

> the circumstances presented here, involving as they do relationships of great delicacy that are essentially political in nature. . . . Judicial intervention in this area traditionally has been approached with great caution and restraint. . . . It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated. Thus, these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties . . . [W]e entertain grave doubts as to the action taken by the Court of Appeals.

The Supreme Court's reluctance to enter the area under discussion is once again emphasized in *Cousins v. Wigoda*, —— U.S. —— (January 15, 1975). Granting that the case is quite distinguishable from the issue here presented, Mr. Justice Brennan emphasized that ". . . the convention itself [was] the proper forum for determining intra-party disputes as to which delegates [should] be seated, *O'Brien v. Brown*, 409 U.S. 1, 4 (1972)."

I have said enough to suggest why I find myself constrained to dissent from the views expounded by my colleagues.

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ORDER

It is ORDERED by the Court *sua sponte* that the opinion of March 5, 1975 in the above entitled cases is hereby amended as follows:

Page [27] of Chief Judge Bazelons opinion, footnote 7, line 7, after 1973, insert the following:

remanded on other grounds, 502 F.2d 1123 (3d Cir. 1974)

Per Curiam
For the Court
/s/ Hugh E. Kline
Hugh E. Kline
Clerk

Filed Apr. 28, 1975

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 74-1337

THE RIPON SOCIETY, INC., ET AL.,
*Appellants*

v.

NATIONAL REPUBLICAN PARTY, ET AL.

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No. 74-1358

THE RIPON SOCIETY, INC., ET AL.,

v.

NATIONAL REPUBLICAN PARTY, ET AL.,
*Appellants*

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Appeals from the United States District Court
for the District of Columbia

(Civil Action 2238-71)

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Before: BAZELON, Chief Judge, DANAHER, Senior Circuit Judge and WILLIAM WAYNE JUSTICE,* United States District Judge for the Eastern District of Texas

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from in these

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* Sitting by designation pursuant to 28 U.S.C. § 292(d).

causes is hereby affirmed in part, reversed in part and these causes are remanded with instructions, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ Hugh E. Kline
Hugh E. Kline
Clerk

Date: March 5, 1975

Opinion for the Court filed by Chief Judge Bazelon.

Dissenting opinion filed by Senior Circuit Judge Danaher

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ORDER

It is ORDERED by the Court, *en banc*, *sua sponte*, that the opinions and judgment filed herein this date are hereby vacated, and it is

FURTHER ORDERED by the Court, *en banc*, *sua sponte*, that these cases shall be reheard by the Court sitting *en banc*.

Per Curiam
For the Court:

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

Filed March 5, 1975

[Reproduced From Court's Draft]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 74-1337

THE RIPON SOCIETY, INC., ET AL.,
*Appellants*

v.

NATIONAL REPUBLICAN PARTY, ET AL.

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No. 74-1358

THE RIPON SOCIETY, INC., ET AL.,

v.

NATIONAL REPUBLICAN PARTY, ET AL.,
*Appellants*

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On Rehearing *en banc*

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Reargued en banc May 30, 1975

Decided September 30, 1975

Before BAZELON, *Chief Judge*, DANAHER, *Senior Circuit Judge*, WRIGHT, McGOWAN, TAMM, LEVENTHAL, ROBINSON, MacKINNON, ROBB, and WILKEY, *Circuit Judges sitting en banc.*

Opinion for the court filed by *Circuit Judge* McGowan.

Opinion filed by *Circuit Judge* MacKinnon, concurring except with respect to the standing of Ripon Society.

Opinion filed by *Circuit Judge* Tamm, with whom *Circuit Judge* Robb joins, concurring in the result.

Opinion filed by *Circuit Judge* Wilkey, concurring in result only.

Dissenting opinion filed by *Chief Judge* Bazelon.

Dissenting opinion filed by *Senior Circuit Judge* Danaher.

McGOWAN, *Circuit Judge*: For the third time in four years, this court confronts a challenge from within one of the two major national political parties to the formula fixed by it for the allocation of delegates to its quadrennial national convention. In the earlier instances, divisions of this court held such challenges to be unavailing for want of merit. Today, for the reasons set forth hereinafter, the court *en banc* reaches the same result with respect to the present appeal.

I

The subject of the appeal is the delegate allocation formula adopted by the National Republican Party for its 1976 convention. The Ripon Society and nine individual plaintiffs[1] have secured the judgment of the District Court that parts of that formula are unconstitutional. 369 F. Supp. 368 (D.D.C. 1974). The ruling of the District Court is not the first one made in plaintiffs' favor. In 1971 they sued to enjoin the use of a similar allocation formula at the 1972 Republican National Convention. Partial relief was granted in April of 1972. 343 F.Supp. 168 (D.D.C. 1972). That judgment was stayed by Justice Rehnquist, 409 U.S. 1222 (1972), and the convention was conducted as planned. Thereafter the appeal from the District Court was dismissed, and the complaint amended to state the present challenge to the 1976 formula.

[1] The defendants in this suit are the National Republican Party and the Republican National Committee. Since both the plaintiffs and the defendants in the District Court are appellants here, we will for clarity's sake refer to them by the former titles.

That formula was adopted, on a vote of 910 to 434, by the delegates to the 1972 convention. It provides as follows: 1,605 delegates, or 72 percent of the total, are allocated according to the states' electoral college votes, each state to receive three delegates per presidential elector; 312 delegates, or 14 percent, are awarded as "victory bonuses" to states voting for the Republican candidate in the last presidential election, each such state to receive a number of additional delegates equal to 60 percent of its electoral college vote, or 20 percent of its electoral college-based delegation (the "proportional victory bonus"); 245 delegates, or 11 percent, are divided equally among the states that voted for the last Republican presidential candidate, each such state to receive five delegates on this basis (the "uniform victory bonus");[2] 50 delegates, or 2 percent, are awarded to the states for Republican election successes at the state level, one such delegate for each Republican governor, senator, or majority of United States Representatives which the state elects in 1972 or a succeeding year prior to the 1976 convention (this bonus will be considered part of the "uniform victory bonus");[3] and 30 delegates, or 1 percent, are divided among the District of

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[2] The formula actually awards 4½ delegates as a uniform bonus for victory in the last presidential election. It also provides, however, that the number is to be added to the proportional bonus of 60 percent of electoral college vote, and resulting fractions increased to next whole number. J.A. 153a. Thus, most states will in effect receive 5 uniform victory bonus votes, and may also receive a proportional bonus greater than the 20 percent figure mentioned in text. For example, a qualifying state having only 3 electoral college votes, and therefore a basic delegation of 9, will receive 7 extra delegates (60% x 3 + 4.5 = 6.3), in effect a uniform bonus of 5 delegates, and a proportional bonus of 2 delegates or 22 percent.

[3] Bonus votes awarded on this basis are limited to two for the election of senators, one for the election of governors, and one for the election of House of Representatives delegation majorities. The 50 and 2 percent figures are based on 1972 successes; the record contains no figures for later elections.

Columbia (14), Puerto Rico (8), Guam and the Virgin Islands (4 each).

Declaratory and injunctive relief was sought on the ground that the formula as a whole, and in particular its various victory bonus features, denied plaintiffs equal protection of the laws. Plaintiffs proposed that the Republican National Committee be permitted to fashion a new formula [4] subject to the constraints that (1) a "substantial" number of delegates be allocated according to the Republican vote in one or more recent elections, (2) the remaining delegates be apportioned on the basis of population or electoral college vote, (3) the District of Columbia be treated for allocation purposes as a state, and (4) the territories receive a number of delegates no greater than what they would be entitled to on a population basis.

The district judge granted relief only in part. Ruling on cross-motions for summary judgment, he forbade the use of uniform victory bonuses, but upheld the formula in other respects. 369 F. Supp. at 376. Plaintiffs have appealed the denial of additional relief; defendants have appealed the granting of any relief at all.

## II

Defendants assert that there are preliminary issues which, if rightly decided, preclude our reaching the merits. These involve the concepts, respectively, of standing to sue, state action, and justiciability. In this part of the opinion, we address these issues in succession.

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[4] Foreseeing this litigation, the delegates to the 1972 convention authorized the National Committee to adopt a new formula should the one contained in Rule 30 be invalidated. Such a new formula must be adopted prior to October 31, 1975. *See* Rule 30, J.A. 153a.

A. *Standing.*

The standing requirement serves many purposes, including that of seeing to it that claims are prosecuted to binding resolution on the merits only by those with a sufficient interest to assure an informed and effective presentation. We would not wish to rule one way or the other in this case without satisfying ourselves that that requirement had been met.[5]

We focus first on the individual plaintiffs. Each of the nine is alleged in the supplementary complaint to be a "citizen of the United States, a Republican, a registered and qualified voter of the District of Columbia or of . . . California, Illinois, Indiana, Massachusetts, Minnesota, New Jersey [or] New York." We

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[5] Objection has been made not only to the standing of plaintiffs to sue, but also to the capacity of the National Republican Party to be sued. It is claimed that no such national party is formally constituted under any state or federal law, and that the term is merely a collective description of the individual state and terrorial Republican Parties. This precise question was resolved against the party in Georgia v. National Democratic Party, 447 F.2d 1271, 1273 n.2 (D.C. Cir.), *cert. denied*, 404 U.S. 858 (1971), and we see no reason for a different result here. In the federal courts, whether or not in the state courts, an "unincorporated association may . . . be sued in its common name for the purpose of enforcing . . . against it a substantive right existing under the Constitution or laws of the United States." FED. R. CIV. P. 17(b). Certainly plaintiffs' purpose is to enforce what they conceive to be a substantive constitutional right. We take it that the existence of an unincorporated association bearing the common name "National Republican Party" was found as a fact by the District Court, and we cannot say this was clear error We know, either from the record or through judicial notice, that there is commonly understood to be a National Republican Party, that it is commonly referred to, and contributed to, as such, that it meets quadrennially in a national convention, and that at the last such convention it formally declared itself "a nationwide Party," whose "general management" it entrusted to the Republican National Committee" subject to direction from time to time of the National Convention." Rules Adopted by the Republican National Convention Held at Miami Beach, Florida, August 21, 1972; Resolution, Rule 19; J.A. 149a, 151a.

think that we may fairly take this as an assertion by each plaintiff of an interest in being represented, through the delegation of his or her state or district, at the National Republican Convention.[6] We see no reason to differentiate, for purposes of the standing requirement, between that interest, and the interest of one seeking representation in a state or national legislature. There is of course no doubt that in the latter context an individual, claiming that his vote is diluted because his representative represents a greater number of constituents than do other representatives in the same assembly, has standing to challenge the constitutionality of the apportionment scheme. *Baker v. Carr*, 369 U.S. 186, 204-208 (1962). The only remaining question is whether the claims of malapportionment in this case are in fact made by plaintiffs whose representation would be improved if those claims were to prevail.

There appears to be at least one such plaintiff for each claim. It is argued that the formula as a whole deviates too far (in favor of the less populous states)

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[6] Plaintiffs' affidavits reveal that each plays an active role in the Republican Party of his or her state or district. Plaintiff Sasseville has been an alternate delegate to the Minnesota Republican Convention and has held "various official party positions." J.A. 123a. Plaintiff Silverman has been "an executive and worker in numerous national state [New York] and local Republican campaigns." J.A. 124a. Plaintiff Sweet was a delegate from New York to the 1968 Republican National Convention. J.A. 125a. Plaintiff Vradenburg has served "on the executive Committee of the Young Republicans." J.A. 127e. Plaintiff White has been a Republican precinct captain and candidate for Alderman in Chicago, J.A. 128a. Plaintiff Allison has been a Republican election official and Representative in the Indiana legislature. J.A. 130a. Plaintiff Halliwell has been a Republican nominee for the California State Senate. J.A. 132a. Plaintiff Behn has been a member of the Massachusetts Republican Platform Committee and an alternate delegate to the national convention. J.A. 133a. Plaintiff Gillette, a past president of the Ripon Society, has served as finance coordinator for a Republican candidate for nonvoting delegate to Congress for the District of Columbia. J.A. 134a.

from proportionality to electoral college representation, to total population, and to the Republican vote in past elections. If so, plaintiffs Halliwell, Silverman, White and Vradenburg, residents of California, New York, Illinois and New Jersey, respectively, clearly stand to benefit.[7] Victory bonuses in general are said to violate the Constitution. If so, there will be a clear benefit to plaintiff Behn, a resident of Massachusetts, the only state which did not cast its electoral vote for the 1972 Republican nominee.[8] To the extent the victory bonuses

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[7] The States named in text are the first, second, sixth, and tenth most populous states according to the 1970 census. Exhibit B, J.A. 76a. Plaintiffs' brief (at 15) alleges, without contradition, that

> [i]f the 1976 Formula were used, the eight most populous states would be allotted 39.1% of the delegates to the 1976 Convention although they have 42.4% of the Electoral College vote and 48.7% of the population, and cast 48.6% of the Republican Presidential vote in 1972; . . .

A stronger case would have been made had such figures been computed for the individual states of which the named plaintiffs are residents. Though they did not do so in their brief to this court, plaintiffs submitted statistical exhibits to the District Court from which the following figures are easily derived:

| State | % of 1976 Convention Delegates Under Rule 30 | % of 1972 Electoral College Vote | % of 1970 Population | % of 1972 Vote for Republican Nominee |
|---|---|---|---|---|
| California | 7.5 | 8.4 | 9.8 | 9.8 |
| New York | 6.8 | 7.6 | 9.0 | 8.9 |
| Illinois | 4.5 | 4.8 | 5.5 | 5.9 |
| New Jersey | 3.0 | 3.2 | 3.5 | 3.9 |

*See* Exhibits A & F, J.A. 74a, 75a, 83a, 84a.

[8] After the judgment of the District Court and prior to this appeal, plaintiff Behn apparently changed his residence from Massachusetts to North Carolina. Br. Appellants at 9. Whether or not he thereby forfeited his standing to seek an appellate ruling on the victory bonus is of no moment, however, since it appears that standing to challenge the bonuses may also be claimed by plaintiff Gillette, a resident of the District of Columbia. *See* note 6 *supra*. Gillette plainly cannot object to the formula as a whole,

are opposed only for the form they take, *i.e.*, uniform and electoral college-based, the plaintiffs from California, New York, Illinois, and New Jersey once again have concrete reason to complain. Finally, the District of Columbia and the territories are allegedly over-represented. All plaintiffs other than Gillette are residents of states, and thus have a sufficient stake in the matter.

The standing of the Ripon Society is more doubtful. It describes itself as a "nationwide organization of young business, professional and academic men and women organized to engage the talents and energies of thinking young people in the cause of constructive Republicanism." Its publications are said to provide "a forum for fresh ideas, well-researched proposals and a spirit of criticism within the Republican Party." Its National Executive Committee authorized this action "to ensure fair and constitutional representation at Republican National Conventions."

Yet the Society claims no harm to itself,[9] nor even to any interest to which it is particularly dedicated.[10] Certainly there may be harm to some of its members, but a party may not ordinarily assert the right of

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since he claims that it greatly over-represents the District. However, we think that standing to make the various claims should be judged with reference to each claim individually. A separate claim is that the Constitution requires that the District be treated exactly as the states are. Br. Appellants at 61. If this claim should succeed and the challenge to the victory bonus should fail, Gillette will plainly be the worse off, since the District qualifies for no bonus votes.

[9] *Compare* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (possibility that statute prohibiting attendance at private schools could force closing of such schools gave them standing to assert constitutional rights of parents to direct the upbringing of children).

[10] *Compare* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 678-90 (1973), (student environmental association whose "primary purpose [was] to enhance the human environment for its members" had standing to challenge ICC action as violative of National Environmental Policy Act).

others.[11] and the Ripon Society has not made a strong case for being excepted from this rule. It makes no claim that its members are uniquely, or even predominantly, injured.[12] It gives no reason to believe that those members who are adversely affected cannot assert their own rights.[13] It seems, in short, merely to have an Executive Committee whose "spirit of criticism" extends to the allocation formula for convention delegates.

Whether the standing requirement has been so far relaxed as to be satisfied by this coincidence alone is, however, a question we need not decide in this case. We have concluded that the individual plaintiffs had standing to bring this suit. The purpose of the requirement is to ensure the presence of a jurisdictional case or controversy, and of "that concrete adverseness which sharpens the presentation of issues."[14] We cannot see how the

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[11] *See, e.g.*, Barrows v. Jackson, 346 U.S. 249, 255 (1953).

[12] *Compare* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 187 (1951) (Jackson, J., concurring) (organization should be permitted to assert members' interests "where the Government has lumped all the members' interests in the organization so that condemnation of one will reach all"). The Supreme Court in Sierra Club v. Morton, 405 U.S. 727 (1972), seemed to espouse the broader principle that "an organization whose members are injured may represent those members in a proceeding for judicial review." However, it denied the Sierra Club standing to challenge the Interior Secretary's grant of permission to develop a National Forest on the ground that the Club had not alleged that any of its members would in fact be adversely affected. *Id.* at 735, 739. Arguably, the Ripon Society meets the latter test by joining with individual plaintiffs who clearly are adversely affected, and who are also members of the Society. Even so, however, the Sierra Club remains distinguishable as an organization whose "special interest" was the protection of the environment.

[13] *Compare* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 459 (1958) (NAACP could assert members' right to freedom of association since "[t]o require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion").

[14] Baker v. Carr, 369 U.S. 186, 204 (1962).

Ripon Society's participation in this case could lessen the controversy, or blur the presentation of issues, or alter the course of the litigation in any way.[15] If the trial judge erred in refusing to strike the Ripon Society as a plaintiff for lack of standing, this error was harmless.

B. *State Action.*

As their claim is founded entirely on provisions of the United States Constitution which apply only to the federal and state governments, essential to the merits of plaintiffs' case is the proposition that a national party's allocation of convention delegates constitutes "state action."[16] We found such action in *Georgia v. National Democratic Party*, *supra* note 5—the first of our prior decisions on delegate allocation. Our reasoning was that since the action of individual state parties in selecting their candidates, and indeed their convention delegates, was state action, it could not be otherwise when those parties acted through their delegates at the national con-

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[15] There is no indication that the Ripon Society differs from the individual plaintiffs on any point. There is no relief to which only it would be entitled. We assume, then, that it would support this suit to the same extent even were it to lose its formal status of a plaintiff.

[16] Plaintiffs rely primarily on the Equal Protection Clause of the Fourteenth Amendment. That provision, the source of the "one man, one vote" rule for state legislatures, *see* Reynolds v. Sims, 377 U.S. 533 (1964), applies only to the states. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Civil Rights Cases, 109 U.S. 3 (1883). Also cited in the supplementary complaint are the Fifth Amendment and Article II, Section 1. J.A. 58a. The Fifth Amendment's Due Process Clause requires that the federal government, like the states, provide equal protection of the laws. Johnson v. Robinson, 415 U.S. 361, 364 and n.4 (1974); Bolling v. Sharpe, 347 U.S. 497 (1954). It applies only to the federal government, however, and not to private citizens. Public Utilities Comm'n. v. Pollak, 343 U.S. 451, 461 (1952). Article II, Section 1 details the procedure for the election of the President through the electoral college. If it has any force at all beyond its specific commands, it also is confined to the federal government.

vention. *Id.* at 1274-75. We also concluded that by placing the nominee of the convention on the ballot, the states "adopted this narrowing process as a necessary adjunct of their election procedures," and thus subjected it to constitutional scrutiny. *Id.* at 1275-76. We adhered to our *Georgia* holding in *Bode* v. *National Democratic Party*, 452 F.2d 1302, 1304 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972). As the question now comes to us a third time, however, its answer is much less clear.

The Supreme Court has in the meantime decided *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), and *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), taking a different, and arguably narrower, view of what constitutes "state action" than is reflected in our *Georgia* decision.[17] The Supreme Court focused in each of those cases on the "nexus between the State and the challenged action" of the ostensibly private entity, rather than on that entity's relationship to the state in general. 419 U.S. at 351. *See also* 407 U.S. at 173. The "nexus" between the states and the delegate allocation formula is open to question, particularly since the Supreme Court has also now held, in *Cousins v. Wigoda*, 419 U.S. 477 (1975), that an individual state is without power to interfere with the delegate selection procedures of a national convention.[18]

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[17] In *Moose Lodge* the exclusion of black guests by a private club possessing a state liquor license was held not to be state action subject to the Fourteenth Amendment's Equal Protection Clause. In *Jackson* the termination of service by a state-regulated public utility was held not to be state action subject to the Fourteenth Amendment's Due Process Clause.

[18] *Cousins* was an appeal from the state courts of Illinois, which had commanded the seating at the 1972 Democratic National Convention of a number of Illinois delegates whom that party's Credentials Committee had disqualified. The United States Supreme Court reversed, primarily on First Amendment grounds. We discuss this case more fully below. The Court carefully reserved the question of whether a national party's selection and allocation of

Nor can we take much comfort from the obvious distinctions between these cases and ours. In *O'Brien v. Brown*, 409 U.S. 1 (1972), the Democratic National Party sought review of an order of this court (462 F.2d 563) that a number of delegates disqualified by the Party's Credentials Committee be seated at its 1972 convention. The Supreme Court *per curiam* stayed our order, professing "grave doubts" as to its propriety.[19] Our finding of state action on the part of the Credentials Committee was specifically questioned. To be sure, *O'Brien* is itself distinguishable as a case not involving the allocation of delegates among the states. Justice Rehnquist at least would apparently not consider this distinction persuasive, since he relied exclusively on *O'Brien* when he stayed the District Court's earlier order in this very case.[20]

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delegates constituted state action, presented a justiciable question, or was subject to the principles of the reapportionment decisions. 419 U.S. at 483 n.4.

Even assuming that our finding of state action in *Georgia* rested not on the power of the states to approve or disapprove the "narrowing process," but merely on their support of its outcome by the placement of the candidate's name on the ballot, *Moose Lodge* and *Jackson* must still give us pause. Both cases rejected claims of state action based on the award to the defendants of a state benefit, which in the case of the power license in *Jackson*, the Court was prepared to assume was a monopoly. *See* 407 U.S. at 177; 419 U.S. at 351-52.

[19] 409 U.S. at 4-5. The stay was granted three days before the opening of the convention. The Democratic National Party's petition for certiorari, which accompanied its stay application, was not disposed of until after the convention, at which time the case was remanded with directions to dismiss as moot. 409 U.S. at 816.

[20] Republican State Central Comm. v. Ripon Society, Inc., 409 U.S. 1222 (1972). The Court in *O'Brien* also gave us reason to question the premise of our first line of reasoning in *Georgia*, *i.e.*, that the elective processes of individual state parties constituted state action for all purposes. The "White Primary Cases" on which we largely based that premise were distinguished in *O'Brien* as "case[s] in which claims [were] made that injury arises from invidious discrimination based on race in a primary contest within a single state." 409 U.S. at 4 n.1. *See also* Cousins v. Wigoda, 419 U.S. at 493-94 (Rehnquist, J., concurring).

If plaintiffs' prospects for success on the state action issue have been somewhat dimmed by the actions of the Supreme Court, they have conceivably been somewhat brightened by those of the Congress. The Federal Election Campaign Act Amendments of 1974, approved on October 15, 1974, provide for federal financing of the 1976 presidential nominating conventions.[21] The national committees of the Republican and Democratic Parties are each to receive two million dollars to defray convention expenses.[22] The presidential primaries, in which many of the delegates to those conventions will be elected, are to receive federal support in the form of a partial matching of the funds raised by candidates running in those primaries.[23] The federal government is also to subsidize the general election campaigns of the party nominees to the tune (potentially) of twenty million dollars for each major party candidate.[24]

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[21] Pub. L. No. 93-443, 88 Stat. 1263. (codified in scattered sections of 2, 5, 18, 47 U.S.C. INT. REV. CODE of 1954).

[22] *See* Pub. L. No. 93-443, Tit. IV, § 406(a); 88 Stat. 1294; *as codified,* INT. REV. CODE of 1954, § 9008. For a summary of recently enacted state plans to provide public financing of the nomination and election processes, see *Developments in the Law-Elections,* 88 HARV. L. REV. 1111, 1265-67 (1975). Such public financing by the federal government was first decreed in 1971, but it was not to take effect until the 1976 election. *See* Pub. L. No. 92-178, Tit. VIII, § 801, 85 Stat. 562, *as codified* INT. REV. CODE of 1954 §§ 9000-13.

[23] *See* Pub. L. No. 93-443, Tit. IV, § 408(c), 88 Stat. 1297; *as codified* INT. REV. CODE of 1954 §§ 9031-42.

[24] *See* Pub. L. No. 93-443, Tit. IV, § 404(a); 88 Stat. 1291; *as codified,* INT. REV. CODE of 1954 § 9004. The candidates of the two major parties are entitled to equal sums not to exceed $20 million which is also the limit on campaign expenditures from whatever source. *See* Pub. L. No. 93-443, Tit. I, § 101(a), 88 Stat. 1263, *as codified* 18 U.S.C. § 608(e)(1)(B). Minor party campaigns, and conventions, are to be subsidized proportionally to their vote in the last presidential election. *See* Pub. L. No. 93-443, Tit. IV, §§ 404(b), 406(a); 88 Stat. 1291, 1294; *as codified* INT. REV. CODE of 1954 §§ 9004(a)(2), 9008(b)(2). The source of all these grants is to be the Presidential Election Campaign Fund, made up of voluntary

If the parties' conventions, and their candidates, are to be so far underwritten by the federal government, then perhaps they must share its constitutional obligations. Of course the public financing provisions may never actually be put into effect. The Supreme Court will soon review an *en banc* decision of this court upholding the constitutionality of these public financing provisions.[25] The entire matter is thus in a state of some uncertainty.

Because, as the Supreme Court said in *O'Brien*, the existence of state action is a difficult and "highly important question," because it may well be a very different question when the matter of federal financing is settled, and because it cannot in any case affect the outcome of this appeal, we decline to decide it. As elaborated below, it is clear to us that plaintiffs' case must fail on its merits without regard to whether or not there is state action, a question which we therefore expressly reserve.[26]

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contributions from federal taxpayers, who may designate one dollar of their federal tax payments for the purpose. *See* INT. REV. CODE of 1954 §§ 6096, 9006. The parties are to receive pro rata shares of their entitlements if the Campaign Fund is insufficient to fund them fully. *See id.* § 9006(d).

[25] Buckley v. Valeo, —— F.2d ——, ——, —— (D.C. Cir.) appeal docketed, 44 U.S.L.W. —— (U.S. Sept. 19, 1975) (Nos. 75-436, 75-437).

[26] Defendants contend that a finding of state action is necessary not only to plaintiffs' success on the merits, but also to the existence of federal jurisdiction. They assert that the only plausible basis for such jurisdiction is 28 U.S.C. § 1343(3), and that the requirement of that section that the suit be one to redress a constitutional deprivation made "under color of . . . state law," cannot be satisfied unless the adoption of the delegate allocation formula constituted state action. In short, they regard this "state action" question as a jurisdictional one. They are not without support for this view. When § 1343(3) has been invoked in suits against defendants claiming disassociation from the state, the courts have often considered the state action question entirely in terms of whether the defendants' actions were "under color of . . . State law." *See, e.g.*, James W. Pinnix, 495 F.2d 206 (5th Cir. 1974); Ward v. St.

C. *Justiciability.*

We pretermit the question of whether the validity of a national political party's actions in apportioning convention delegates is justiciable in the federal courts. This also was a matter decided in *Georgia*, 447 F.2d at 1276-78, regarded as settled in *Bode*, 452 F.2d at 1305, and subjected to "grave doubts" in *O'Brien*, 409 U.S. at 4-5. While it is not, like the state action question, one which rests upon shifting statutory ground, it is nonetheless one of obvious difficulty.

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Anthony Hospital, 475 F.2d 671 (10th Cir. 1973); Chicago Joint Board, Amalgamated Clothing Workers of America v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968).

We have considered, but rejected, the possibility of basing jurisdiction on alternative approaches so that we need not confront questions concerning both whether our jurisdiction under § 1343(3) depends on the existence of state action and whether the requisite state action is present in the circumstances of this case. One possibility is that a plaintiff asserting jurisdiction under § 1343 (3) need only raise a substantial question as to the existence of state action in order to gain access to the federal courts. *Cf.* Bell v. Hood, 327 U.S. 678, 682-83 (1946) (jurisdiction exists under § 1331 unless the constitutional claim is "frivolous"); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (finding of no state action cast in terms of dismissal on merits). Another alternative is to base jurisdiction on § 1331. No amount in controversy has been alleged herein, but conceivably such an allegation is unnecessary where personal civil rights are sought to be vindicated. *See* Cortright v. Resor, 325 F.Supp. 797 (S.D.N.Y.), *rev'd*, 447 F.2d 246 (2d Cir. 1971). *But see* Gomez v. Wilson, 477 F.2d 411, 420-21 n.56 (D.C. Cir. 1973).

We are disinclined, however, to rest on either of these alternative approaches given the scant or nonexistent attention that the parties have addressed to them (§ 1331 was not cited by the plaintiffs). We will assume, rather than hold, that our jurisdiction under § 1343(3) depends on the existence of state action. Consequently, since we are pretermitting the question of whether or not there is state action in this case, we reserve also the question of jurisdiction under § 1343(3). *See* note 28 *infra*, and cases cited.

*Georgia* and *Bode* were decided in the wake of *Baker v. Carr*, 369 U.S. 186 (1962), and *Powell v. McCormack*, 395 U.S. 486 (1969), two decisions which seemed to drain the "political question" doctrine of much of its vitality.[27] The Court in the former case declared that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question." 369 U.S. at 209. Such questions were said to arise from "the relationship between the judiciary and the coordinate branches of the Federal Government." *Id.* at 210. Arguably the question now before us is nonjusticiable under *Baker* because of a "lack of judicially discoverable and manageable standards for resolving it." *Id.* at 217. Yet the *Baker* Court considered "manageable" for legislative apportionment schemes a standard quite similar to the one we apply below to delegate apportionment schemes. It held that legislative schemes were to be struck down only if they "reflect . . . *no* policy but simply arbitrary and capricious action." *Id.* at 226.

*Powell* appeared to curtail the "political question" doctrine even further. Faced with what might have been thought the classically "political question" of whether the House of Representatives—a coordinate branch—had properly excluded one of its members, the Court found the question justiciable. Significantly for our case, it rested that finding in part on the involvement of the right to choose one's own representatives, which compelled it to "resolve any ambiguity in favor of a narrow construction of the scope of Congress's power." 395 U.S. at

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[27] A question may be nonjusticiable for reasons other than its being a "political question." The justiciability issue is the broader one of whether the particular question is "capable of resolution through the judicial process," as it may not be purely because it does not arise in a "case or controversy." Flast v. Cohen, 392 U.S. 83, 94-101 (1968). We have resolved our doubts on that score under the heading of "standing," *supra*, and confine ourselves here to the "political question" doctrine of nonjusticiability.

547. In seemingly sharp contrast with this approach, we have been more recently admonished by the Court to exercise "great caution" before we "interject [ourselves] into the deliberative processes of a national convention, . . . involving as they do relationships of great delicacy that are essentially political in nature." *O'Brien v. Brown*, 409 U.S. at 4.

In declining to decide the question of justiciability, we note its close relationship to the question we do decide, that is to say, the merits of the constitutional claims. Defendants' arguments for nonjusticiability are that the "manageable" one person, one vote standard is inapplicable, and that without it a court has no basis for evaluating the political judgments that parties make in choosing among alternative delegate allocation schemes. Our view is not so different. We agree that a strict one person, one vote standard is inapplicable, and, since we consider the party's choice among allocation schemes to be as much an exercise as an infringement of constitutional rights, we cannot say that it offends the Constitution. What we decline to do, however, is to take the more drastic step of holding that we would never be competent to reach a contrary conclusion.[28]

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[28] We recognize that "state action" and "justiciability" are often regarded as threshold issues. We see nothing illogical about passing over them, however, and we certainly do not lack authority for doing so. In United States v. Augenblick, 393 U.S. 348 (1969), the Court of Claims had awarded back pay to two ex-servicemen on the ground that their constitutional rights had been violated in the courts-martial which preceded their military discharges. Certiorari was granted "because of the importance of the question concerning the jurisdiction of the Court of Claims to review judgments of courts-martial." *Id.* at 349. After brief discussion of that question, however, the Court expressly declined to decide it, since "even if we assume, arguendo, that a collateral attack on a court-martial judgment may be made in the Court of Claims through a back-pay suit alleging a 'constitutional' defect in the military decision, these cases on their facts do not rise to that level." *Id.* at 351-52. The Court similarly declined to rule on a challenge to jurisdiction, preferring

## III

Having assumed *arguendo* that defendants are subject to justiciable constitutional limitations, we confront the question of whether those limitations have been exceeded in this case. Our discussion falls into two parts, the first dealing with what in general the Constitution requires in the allocation of delegates to a national political convention, and the second inquiring as to whether this particular formula satisfies those requirements.

### A. *Applicability of One Person, One Vote.*

As noted above, plaintiffs rely primarily on the constitutional guarantee of equal protection. They analogize the Republican National Convention to the state legislatures in which that guarantee has been held to require representation on a "one man, one vote" basis. Plaintiffs propose that the constituency whose members are each to have "one vote" be either the entire population of a state, or that part of it that voted Republican in one or more past elections. Their entire argument is couched in terms of the challenged formula's deviations from proportionality to those constituencies. Although they would apparently accept some such deviations, they would set as an outer limit the deviations present in the electoral college. The disproportionality introduced by the victory bonus system they do not consider justifiable. In short, they argue that, whichever of its permissible constitu-

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a denial of relief on the merits, in Secretary of the Navy v. Avrech, 418 U.S. 676, 677-78 (1974), and in Schneckloth v. Bustamonte, 412 U.S. 218, 249 and n.38 (1973). *See also* Public Utilities Comm'n. v. Pollak, 343 U.S. 451, 462-63 (1952) (Court proceeds to merits of constitutional claim, "assuming" but apparently not deciding that action of regulated transit company constituted "state action"); Irish v. Democratic Farmer Labor Party of Minnesota, 287 F.Supp. 794 (D. Minn.), *aff'd.*, 399 F.2d 119 (8th Cir. 1968) (relief denied without decision of whether state party's election of delegates constituted "state action").

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### A. *Applicability of One Person, One Vote.*

As noted above, plaintiffs rely primarily on the constitutional guarantee of equal protection. They analogize the Republican National Convention to the state legislatures in which that guarantee has been held to require representation on a "one man, one vote" basis. Plaintiffs propose that the constituency whose members are each to have "one vote" be either the entire population of a state, or that part of it that voted Republican in one or more past elections. Their entire argument is couched in terms of the challenged formula's deviations from proportionality to those constituencies. Although they would apparently accept some such deviations, they would set as an outer limit the deviations present in the electoral college. The disproportionality introduced by the victory bonus system they do not consider justifiable. In short, they argue that, whichever of its permissible constitu-

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a denial of relief on the merits,, in Secretary of the Navy v. Avrech, 418 U.S. 676, 677-78 (1974), and in Schneckloth v. Bustamonte, 412 U.S. 218, 249 and n.38 (1973). *See also* Public Utilities Comm'n. v. Pollak, 343 U.S. 451, 462-63 (1952) (Court proceeds to merits of constitutional claim, "assuming" but apparently not deciding that action of regulated transit company constituted "state action"); Irish v. Democratic Farmer Labor Party of Minnesota, 287 F.Supp. 794 (D. Minn.), *aff'd.*, 399 F.2d 119 (8th Cir. 1968) (relief denied without decision of whether state party's election of delegates constituted "state action").

encies the Republican Party chooses to represent at a national convention, it must represent those constituents as a legislature would, and give them mathematically equal representation or have a compelling reason not to. That is the essence of the claim, and also its essential fallacy.[29]

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[29] The Supreme Court has not ruled on the applicability of one person, one vote to the selection and apportionment of delegates to national political conventions. *See* Cousins v. Wigoda, 419 U.S. 477, 483 n.4 (1975), note 18 *supra*; Gray v. Sanders, 372 U.S. 368, 378 n. 10 (1963), note 65 *infra*. The lower courts have divided on the point. One person, one vote was found inapplicable in Irish v. Democratic-Farmer-Labor Party of Minnesota, 399 F.2d 119 (8th Cir.), *aff'g* 287 F.Supp. 794 (D. Minn. 1968) (party may select national convention delegates through malapportioned state convention system), and apparently also in Smith v. State Exec. Comm., 288 F. Supp. 371 (N.D. Ga. 1968) (Equal protection satisfied by election of national convention delegates in "open convention"). Two District Courts have squarely held to the contrary. Doty v. Montana State Democratic Central Comm., 333 F. Supp. 49 (D. Mont. 1971) (party may not select national convention delegates through malapportioned state convention system); Maxey v. Washington State Democratic Comm., 319 F.Supp. 673 (W.C. Wash. 1970) (same). Several courts have distinguished between "internal" party affairs and party nominations, holding the one person, vote rule applicable only to the latter. Seergy v. Kings County Republican County Comm., 459 F.2d 308 (2d Cir. 1972) (county committeemen may be elected from unequal districts, but when nominating functions are performed malapportionment must be corrected by weighting of members' votes); Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965) (one person, one vote inapplicable to selection of party's county committees); Dahl v. Republican State Comm., 319 F. Supp. 682 (W.D. Wash. 1970) (holding of *Maxey, supra*, inapplicable to selection of party's state committee). In Redfearn v. Del. Republican State Comm., 502 F.2d 1123 (3d Cir. 1974), the District Court had held the one person, one vote rule applicable to the party's state convention. The Third Circuit was apparently willing to assume that if the conduct of the convention were "state action," one person, one vote would be required. Troubled by the resulting interference with "the highly relevant associational rights of the Party," however, it remanded the case with directions to the District Court to consider whether the "state action" should not be removed by invalidation of the statute which implicated the state in the party's nominating process.

The fact that the conduct of a national political convention may be subject to the Equal Protection Clause does not in itself establish the applicability of the one person, one vote rule. Manifestly, a given constitutional command may not require of one part of the state what it requires of another. The army and the park commissioner are not equally constrained by the First Amendment; the President is not subject to the same restraints in making appointments as Congress is in passing legislation. And indeed it is clear that the Equal Protection Clause does not impose the same one person, one vote rule upon all elected and decision-making bodies, even if they are formally and indisputably organs of the state.

That rule is not, for example, applicable to the election of state judges. The plaintiffs in *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), challenged the federal constitutionality of the provisions in the Louisiana Constitution for the election of the justices of that state's supreme court from judicial districts of unequal population. It was held that "the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the make-up of the judiciary." *Id.* at 455. The Supreme Court affirmed. 409 U.S. 1095 (1973) (memorandum).[30]

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[30] *See also* Holshouser v. Scott, 335 F.Supp. 928, 933 (M.D. N.C. 1971), *aff'd*, 409 U.S. 807 (1972) ("showing of an arbitrary and capricious or invidious action or distinctions between citizens and voters would be required" to invalidate scheme of judicial nomination by unequal districts); Stokes v. Fortson, 234 F. Supp. 575, 577 (N.D. Ga. 1964) ("Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency."). *Cf.* Buchanan v. Gilligan, 349 F.Supp. 569, 571 (N.D. Ohio 1972); N.Y. State Ass'n of Trial Lawyers v. Rockefeller, 267 F. Supp. 148, 153 (S.D.N.Y. 1967); Buchanan v. Rhodes, 249 F. Supp. 860 (N.D. Ohio), *appeal dismissed*, 385 U.S. 3 (1966) (all rejecting equal protection challenges to unequal distribution of local district judgeships).

At least one federal district court and four state supreme courts have similarly held that the one person, one vote principle is inapplicable to state constitutional conventions, which "can only make proposals which can have no effect unless . . . ratified in another election [with] every vote given the same weight." *Driskell* v. *Edwards*, 374 F. Supp. 1, 3 (W.D. La.), *vacated*, 419 U.S. 812 (1974),[31] quoting from *West v. Carr*, 212 Tenn. 367, 370 S.W. 2d 469, 474 (1963), *cert. denied*, 378 U.S. 557 (1964). *Accord*, *Bates v. Edwards*, 294 So. 2d 532, 534 (1974); *Stander v. Kelley*, 433 Pa. 406, 250 A.2d 474, 481, *cert. denied sub nom. Lindsay v. Kelley*, 395 U.S. 827 (1969); *Livingston v. Ogilvie*, 43 Ill. 2d 9, 250 N.E. 2d 138, 145-46 (1969).

We know also that the one person, one vote requirement, though generally applicable to local as well as state and federal assemblies,[32] does not apply to certain "special purpose" assemblies whose decisions "disproportionately affect different groups." *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 727 (1973). Though it had required equal representation on local school and higher education boards,[33]

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[31] The procedures challenged in *Driskell* were mandated by the Louisiana Constitution. Plaintiffs sought to enjoin enforcement thereof, and therefore requested the convening of a three-judge district court pursuant to 28 U.S.C. § 2281 (1970). Their suit was dismissed by a single judge for lack of a substantial federal question, 274 F. Supp. at 3, yet direct appeal was sought in the Supreme Court. The appeal was ruled improper. The Court vacated the judgment and remanded the case "with directions to enter a fresh decree from which a timely appeal may be taken to the Court of Appeals." 419 U.S. at 812.

[32] Abate v. Mundt, 403 U.S. 182 (1971); Avery v. Midland County, 390 U.S. 474 (1968).

[33] Hadley v. Junior College Dist. of Metropolitan Kansas City, 397 U.S. 50 (1970); Kramer v. Union Free School Dist., 395 U.S. 621 (1969). *See also* Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969) (both invalidating

the Supreme Court in *Salyer* permitted the directors of a water storage district to be elected by agricultural land owners only, with the latters' votes being weighted according to the valuation of their lands. It was reasoned that "the district does not exercise what might be thought of as 'normal governmental' authority" and that "all of the costs of district projects are assessed against land by assessors in proportion to the benefits received." *Id.* at 729.

Obviously, these exceptions to the one person, one vote requirement occur in contexts too far removed from that of a national political convention for them to be dispositive of the case before us. They do demonstrate, however, that the principle of one person, one vote is not an absolute, to be unthinkingly invoked every time two or more persons are selected to make decisions on other people's behalf, even if the making of those decisions is very plainly "state action." The constitutional command is not one person, one vote but equal protection of the laws, and what it requires by way of representation in a given assembly must depend on the purposes for which the assembly is convened and the nature of the decisions it makes. The Supreme Court's inquiry into these matters has led it to the conclusion that where the assembly exercises formal governmental powers one person, one vote is ordinarily required. A similar inquiry in other contexts may well reveal that the public and private interests in making decisions through some other scheme of representation outweigh the interests served by numerically equal apportionment.

We think the national political parties may validly so conclude with respect to their presidential nominating conventions. As explained more fully below, these have never had, or been conceived as having, the function of

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restrictions on franchise in elections to approve municipal bond issues).

providing a strict one person, one vote representation to a definable national constituency. Weighted representational schemes are only one of the numerous and scarcely distinguishable ways, some of them having judicial sanction, in which the political parties conduct their affairs in something short of a scrupulously democratic fashion. Most significant, the interests they advance by adopting representational schemes of their own choosing seem to us to be of great importance and of clearly constitutional stature.

Political parties are nowhere referred to in the Constitution—not surprisingly in view of their low reputation among our nation's founders. Washington warned his countrymen "in the most solemn manner against the baneful effects of the spirit of party," [34] and Madison thought it a principal task of the new Constitution to hold the "mischiefs of faction" in check.[35] Nonetheless we have had political parties pretty much from the beginning,[36] and with rare and early exceptions we

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[34] *G. Washington, Farewell Address, reprinted in* DOCUMENTS OF AMERICAN HISTORY 169, 172 (H. Commager ed. 1946).

[35] *J. Madison, The Federalist No. 10, reprinted in* THE FEDERALIST, 56, 58 (Cooke ed. 1961).

[36] John Adams has left us the following description of the way political candidates were chosen even in 1763:

> This day learned that the Caucus Club meets at certain times in the garret of Tom Dawes, the Adjutant of the Boston Regulars. He has a large house . . . and the whole club meets in one room. There they smoke tobacco till you cannot see from one end of the garret to the other. There they drink flip I suppose and they choose a moderator who puts questions to the vote regularly; and selectmen, assessors, collectors, firewards, and representatives are regularly chosen before they are chosen in town . . . .

II THE WORKS OF JOHN ADAMS 144 (C.F. Adams ed., 1850). Perhaps the prevalence of parties in American politics was inevitable. It was early observed that

> Americans of all ages, all conditions, and all dispositions constantly form associations. . . . The Americans make associations

have chosen our Presidents from among the candidates those parties put forward.[37] Like the election itself, early political nominations for President were anything but democratic. Throughout the first part of the eighteenth century they were made by party caucuses—usually comprised of that party's delegation to Congress. Credit for the downfall of "King Caucus," is generally given to Andrew Jackson who successfully fought for, and benefitted from, a change to the ostensibly more democratic convention system.[38] That system appears to have been firmly in effect in both major parties by 1840, and in substantially the same form that we are familiar with today.

From the start delegate votes at the convention were apportioned according to each State's electoral college vote.[39] Indeed it is somewhat ironic that the convention,

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to give entertainments, to found seminaries, to build inns, to construct churches, to diffuse books, to send missionaries to the antipodes. . . . Wherever at the head of some new undertaking you see the government in France, or a new man or rank in England, in the United States you will find an association.

II A. DE TOCQUEVILLE DEMOCRACY IN AMERICA 106 (Knopf ed. 1945).

[37] Regular presidential contests between the Republican and Democratic parties began in 1852. However, the present Democratic Party can trace its origins to the Democratic Republican Party which Thomas Jefferson began to assemble even before the end of Washington's first term. H. BONE, AMERICAN POLITICS AND THE PARTY SYSTEM 28-30 (1971). A case can likewise be made that Hamilton's Federalists and subsequently the Whig Party were the predecessors of the present Republican Party. E. SAIT, AMERICAN PARTIES AND ELECTIONS 205 (1927). If so, then the only Presidents who may plausibly claim not to be the products of the two-party rivalry are James Monroe and John Quincy Adams, who served during a sort of party "interregnum" after the decline of the Federalists and before the rise of the Whigs. *See* BONE, *supra* at 28.

[38] *See* E. SAIT, *supra* note 37, at 245; BONE, *supra* note 37, at 287.

[39] E. SAIT, *supra* note 37, at 249.

the first major reform of the nominating process, brought with it an apportionment scheme that bore no relation at all to the relative strength of the parties in the various states, whereas the congressional caucus reflected that strength quite accurately.[40]

There was recurrent criticism of electoral college-based apportionment, particularly in the Republican Party, where it gave inordinate control to delegates from southern States in which the Party had no hope of electoral success. Reform finally came in 1913, and in a way which presents a second irony for this case: the electoral college basis was in effect retained, but an extra vote was awarded to congressional districts which had voted Republican in past elections.[41] Party strength was thus reinstated as a basis for delegate apportionment through a bonus vote system such as the one to which plaintiffs so strenuously object.[42] The Party has em-

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[40] John C. Calhoun, an early opponent of the caucus system, was later to write:

> Objectionable as I think a congressional caucus for nominating a President, it is in my opinion far less so than a convention constituted as is proposed. The former had indeed many things to recommend it. Its members . . . were the immediate organs of the State Legislatures or the people; were responsible to them, respectively, and were for the most part of high character, standing, or talents. They voted *per capita*; and, what is very important, *they represented fairly the relative strength of the party in their respective states.*

VI. WORKS OF JOHN C. CALHOUN 247 (Cralle ed. 1968) (emphasis added).

[41] *See* E. SAIT, *supra* note 37, at 438.

[42] Of course the bonus system still has the effect of making delegate apportionment more reflective of party strength than it would be if based on electoral college vote alone. In individual cases it may also make the apportionment more reflective of population. Thus, in our case, the fact that California voted for the 1972 Republican nominee, and Massachusetts did not, suggests that the Party is stronger in California. Because of its 1972 vote California receives a bonus under the challenged formula. The bonus

ployed some such mixture of electoral college-based and bonus votes ever since.[43]

We mention these few historical facts not because we think that what has been true in the past must always remain so, but merely to put the matter in perspective. In requesting that we impose a one person, one vote rule on the Republican Party, plaintiffs are not asking us to correct a historical aberration contrived at the 1972 convention. They are inviting us to take into judicial hands a process of change and adaptation that still continues within the Party.

We have twice declined that invitation in the *Georgia* and *Bode* cases. It is particularly significant that in the latter case we expressly upheld the parties' long-standing practice of apportioning delegates according to electoral college strength.[44] The Democratic Party formula challenged in *Bode* allocated 54 percent of the delegates on that basis. Although it allocated the remaining 46 percent according to Democratic voting strength as measured in past elections, it was not for that reason, or even because of the analogy to the electoral college itself, that we sustained the formula. Electoral college apportionment was perceived to have an "independent rationality for its use," which was that it reflected "a judgment exercised toward maintaining and enlarging party appeal on a national scale." 452 F.2d at 1309.

In thus upholding electoral college apportionment we have in effect already discarded the notion that national

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redresses to some extent the over-representation Massachusetts would otherwise have (as compared to California) both in terms of population and party strength.

[43] *See* P. DAVID, R. GOLDMAN, & R. BAIN, THE POLITICS OF NATIONAL PARTY CONVENTIONS 165-68 (1960).

[44] In *Georgia* we confined ourselves to considering, and rejecting, "the precise claim advanced by appellants" that delegate allocation must constitutionally reflect total population only. 447 F.2d at 1280.

convention delegates must represent some constituency on a one person, one vote basis.[45] Electoral college apportionment obviously is not related to any set of Republican Party members or adherents. It bears some relation to total population, but only a very rough one.[46]

There are any number of other party practices which are seemingly inconsistent with a strict one person, one vote requirement, and which either have survived judicial scrutiny or, we think, would surely do so if challenged. They at least demonstrate the size of the task that the courts would be undertaking were they to impose a one person, one vote rule on the presidential nominating process.

The Republican Party does much of its business through a National Committee, which is malapportioned to the extent of being comprised of two members from each state.[47] Moreover, one of the members must be a woman and one a man, a condition of dubious validity in re-

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[45] Our opinion in *Bode* specifically disapproved the ruling of the District Court that the Constitution required a delegate allocation formula "based on the number of Democratic voters voting in one or more immediately preceding Presidential elections." 452 F.2d at 1303.

[46] Electors from large States represent up to 4.4 times as many people as do electors from small States. One of Alaska's three electors represents 100,724 people according to the 1970 census. One of New York's forty-one electors represents 443,677 people. *See* Exhibits A, F. & P-2, J.A. 74a, 83a, 183a.

[47] *See* Republican Rules No. 19, J.A. 151a ([The National] Committee shall have the general management of the affairs of the Republican Party in the United States and its territories subject to direction from time to time of the National Convention.")

The importance of the National Committee in an organization which meets in convention only once every four years is underscored by the fact that it would fall to this body to fashion a new delegate allocation formula should the present one be invalidated. *See* note 4 *supra*.

spect of membership in, let us say, a state legislature.[48] A committee system of such malapportioned and predetermined membership has historically dominated both parties down to their grass roots.[49] They have been excused from equal representation requirements on the ground that they only administer the party's "internal affairs," [50] but the distinction is not a strong one. In addition to conducting the national convention [51] the National Committee dispenses patronage and party funds.[52] It makes numerous important political decisions during the periods between national conventions—whose policies are favored in party publications and pronouncements, whose local campaigns are aided by appearances of nationally prominent party members, and so on. The fortunes of presidential hopefuls rise and fall with such decisions.

Turning to the delegates themselves, a party might well wish to impose conditions on delegate selection which

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[48] *See* Republican Rule 20. State Party Chairman are also *ex officio* members of the Republican National Committee. Republican Rule 19(b), J.A. 151a.

[49] *See, e.g.*, the facts of Seergy v. Kings County Republican County Comm., 459 F.2d 308 (2d Cir. 1972). Delegates to the 1976 Republican National Convention will also select Resolutions, Credentials, Rules and Order of Business, and Permanent Organization Committees, composed, like the National Committee, of one man and one woman from each State. *See* Republican Rule 14, J.A. at 150a.

[50] Seergy v. Kings County Republican County Comm., 459 F.2d 308 (2d Cir. 1972); Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965); Dahl v. Republican State Comm., 319 F. Supp. 682 (W.D. Wash. 1970).

[51] For an account of the crucial role that administrative decisions (appointments of sub-committees and their chairmen delegate seating and accommodations, media coverage, etc.) played in the 1968 National Democratic Convention *see* COMMISSION OF THE DEMOCRATIC SELECTION OF PRESIDENTIAL NOMINEES, THE DEMOCRATIC CHOICE 40-43 (Hughes Commission Report, 1968).

[52] *See* BONE, *supra* note 37, at 180-81, 201-04.

are inconsistent with an unconstrained, mathematically equal system of representation. The Democratic Party recently did so by establishing quotas for the membership in state delegations of minorities, women, and young people.[53] Could a national convention take the more drastic step of refusing for some reason perceived to be in the Party's best interests to seat a State's delegation *at all?* Apparently so. The Supreme Court stated in *Cousins v. Wigoda* that "[t]he Convention was under no obligation to seat the respondents [whom the Illinois court ordered seated] but was free to leave the Chicago seats vacant and thus defeat the objective." 419 U.S. at 488.

"Equal" apportionment of delegates among the states is presumably sought in order to insure "equal" representation of the people in those states. Yet the actual selection of delegates at the state level varies from the highly democratic to the opposite extreme. In a number of states the selection is made not in a primary election but through a series of local, county, and state caucuses and conventions. Often these are malapportioned,[54] and

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[53] DEMOCRATIC NATIONAL COMMISSION ON PARTY STRUCTURE AND DELEGATE SELECTION, MANDATE FOR REFORM, *reprinted in* (and hereinafter cited to) 117 CONG. REC. 32909, 32915 (1971). The quotas were not mandatory, but, as one member of the Commission which conceived the quota system reports, "most state delegations chose to play it safe by making sure they had close to the required percentages of each favored group." *Ranney, Changing the Rules of the Nominating Game,* CHOOSING THE PRESIDENT 78 n. 1 (Barber ed., 1974). A comparable committee of Republicans was appointed to recommend changes in the rules for selection of delegates to that Party's 1972 convention. One of its recommendations, not accepted, was that "each State [shall] include in its delegation to the Republican national convention delegates under 25 years of age in numerical equity to their voting strength within the State." II REPORT OF THE DELEGATES AND ORGANIZATION Committee 5-9 (Republican

[54] *See, e.g.,* the facts of Maxey v. Wash. State Democratic Comm., National Committee publication, 1971).

319 F.Supp. 673 (W.D. Wash. 1970); Irish v. Democratic-Farmer-Labor Party of Minn., 287 F. Supp. 794 (D.Minn. 1968). The dele-

often voter participation is so slight as to make the selection process one virtually (or even officially) of appointment by party officials.[55] A practice that is more defensible perhaps, though scarcely more "democratic," is the granting of *ex officio* delegate status to party officials or public office holders, presumably because of their special wisdom and expertise.[56]

There are a number of respects, then, in which the parties conduct their affairs other than by giving equal attention to the preferences of all voters, or even all party adherents.[57] Perhaps this is not surprising. A

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gate selection procedures of the states are surveyed in *Developments in the Law-Elections*, 88 HARV. L. REV. 1111, 1153-54 (1975). Republican Rule 31 permits a selection of national convention delegates by primary election, "[b]y Congressional District or State Conventions," or "[b]y the Republican State Committee or Governing Committee in any State in which the law specifically authorizes the election of Delegates . . . in such manner." J.A. 153a-154a.

[55] *See*, HUGHES COMMISSION REPORT, *supra* note 51, at 19-27, 24 ("The Commission's study indicates that over 600 delegates to the 1968 Convention were selected by processes which have included no means of voter participation since 1966.") *Note, Constitutional Safeguards in the Selection of Delegates to Presidential Nominating Conventions*; 78 YALE L. J. 1228, 1240-52 (1969).

[56] The McGovern-Fraser Commission reported that this was the practice of the Democratic Parties of a number of states, one or which selected 12 of its 47 delegates to the 1968 Democratic National Convention on an *ex officio* basis. MANDATE FOR REFORM, *supra* note 53, at 32914.

Both parties have attempted to eliminate some of the described practices. *See generally* MANDATE FOR REFORM, *supra* note 53; REPORT OF THE DELEGATES AND ORGANIZATION COMMITTEE, *supra* note 53. However, even the more far-reaching reforms of the Democratic Party did not eliminate entirely the practice, found to be prevalent in about one fifth of the States, of selecting delegates by committees of party officials. *See* MANDATE FOR REFORM, *supra* note 53, at 32914, 32917.

[57] It will perhaps add to our perspective to note that the United States is virtually unique among western democracies in the degree to which the selection of party candidates is entrusted even to the party rank and file. Elsewhere this is regarded as a function

party is after all more than a forum for all its adherents' views. It is an organized attempt to see the most important of those views put into practice through control of the levers of government.[58] One party may

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of the party leadership. *See* L. EPSTEIN, POLITICAL PARTIES IN WESTERN DEMOCRACIES, 201-32 (1967). The British system for selecting candidates for Parliament is judged in the cited study to be far more typical, and is described in the following terms:

> The types of local leaders dominating the process vary from party to party and from locality to locality. They may, for instance, [in the Labour party] be trade-union leaders rather than just political activists. But in any case they are relatively few in number. Candidate selection is not the business of the party rank and file. . . . There is no need—in fact, it is usually regarded as undesirable—for aspirants to campaign before the membership. Candidate selection is meant to be oligarchical.

*Id.* at 220. Canada's major political parties conduct "national leadership conventions" which resemble ours in the sense that they purport to be representative of the party membership. The representational scheme, however, is one which gives power even more explicitly to the individuals and groups who contribute the most to the party. At the 1968 Conservative Party convention, for example, 35 percent of the delegates were selected on an *ex officio* basis from among "the major officers of federal and provincial party association, women's organizations and university clubs, along with members of Parliament, the Senate, and provincial legislatures." *J. Lele, G. C. Perlin & H. G. Thorburn, The National Party Convention,* PARTY POLITICS IN CANADA 109, (Thornburn ed. 1972). *See also* J. PARRIS, THE CONVENTION PROBLEM 36-37 (1972).

[58] This point is driven home by the difficulty of determining what exactly is the "constituency" of a national convention. Is it the entire population, much of which may have not the slightest interest in what the convention decides? Is it the registered party membership, a class which does not even exist in some states? Plaintiffs contend that it is the set of voters who voted for the party's candidates in past elections. That is a different set for each election, of course, a fact that only serves to demonstrate that the circumstances of those elections may have been such as to attract to the party's candidates large numbers of voters who retain no continuing interest in its fortunes. If we cannot identify with any confidence the set of people whose preferences are to be given equal and accurate expression at a party convention, then perhaps we must admit that that is not the primary purpose

think that the best way to do this is through a "strictly democratic" majoritarianism. But another may think it can only be done (let us say) by giving the proven party professional a greater voice than the newcomer. Which of these approaches is the more efficacious we cannot say, but the latter certainly seems a more accurate description of how political parties operate in reality.

What is important for our purposes is that a party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserve the *protection* of the Constitution as much if not more than its condemnation. The express constitutional rights of speech and assembly are of slight value indeed if they do not carry with them a concomitant right of political association. Speeches and assemblies are after all not ends in themselves but means to effect change through the political process. If that is so, there must be a right not only to form political associations but to organize and direct them in the way that will make them most effective.

The Supreme Court has frequently stressed the close kinship of the freedoms of speech and of political association. *See, e.g., Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). It has declared that "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). It has invoked the First Amendment to strike down state restrictions on access to the general election ballot, stating that "[t]he right to form a party for the advancement of political goals means little if a party

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of such a convention at all. The primary purpose is to chart a course for the advancement of the party's ideals, and it is in that light that the requirements of equal protection are to be discerned.

can be kept off the election ballot and thus denied an equal opportunity to win votes." *Williams v. Rhodes*, 353 U.S. 23, 30-31 (1968).[59]

Last term the Court in *Cousins v. Wigoda* placed the internal workings of a political party squarely within the protection of the First Amendment. The delegates whom the Illinois courts had ordered seated in that case had been selected in accordance with Illinois law, but not the Democratic Party's Guidelines. Illinois claimed "a compelling interest in protecting the integrity of its electoral process." The Court held that this interest could not prevail against the "constitutionally protected rights of association" which the Party exercised in seating the delegation of its choice. 419 U.S. at 489. Nor can the case be explained as one in which the Court was preferring the delegates who were elected in the clearly more democratic way: those whom the Illinois courts ordered seated were elected in primaries; those who were seated by the Party were chosen in private caucuses. *Id.* at 478-80. If First Amendment rights are exercised when a Party determines the make-up, or perhaps even the existence, of state delegations, we think the same is true when it determines their size.

The First Amendment is of course not our only concern. We are keenly aware that "[a]s a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made." [60] If the right to vote is a right to true participation in the elective process, then it is heavily implicated in the nomination process. We do not deny this, but rest our judgment on the view that, as between that right and the right of free political association, the latter is more

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[59] *See also* G. ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION 171-244 (1961).

[60] Newberry v. United States, 256 U.S. 232, 286 (1921) (Pitney, J., dissenting).

in need of protection in this case. As is further elaborated below, the right to organize a party in the way that will make it the most effective political organization seems clearly at stake here. The right of one person to one vote is of course preserved in the general election. Theoretically at least, persons dissatisfied with the choice facing them in that election may gain access to the ballot by means other than a major party nomination. They could, of course, form their own party. Of more practical importance is the fact that there are two major parties, which for the time being at least are in intense competition. Persons not heard in one party may be welcomed in the other, and if there are enough such defections, the offending party may lose the general election, as both parties must be well aware.[61]

We conclude, therefore, that the Equal Protection Clause, assuming it is applicable, does not require the representation in presidential nominating conventions of some defined constituency on a one person, one vote basis. It is satisfied if the representational scheme and each of its elements rationally advance some legitimate interest of the party in winning elections or otherwise

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[61] The contest in this case of two conflicting constitutional rights suggests an analogy to Columbia Broadcasting System v. Democratic National Comm., 412 U.S. 94 (1973), holding that the First Amendment did not require broadcast licensees to accept editorial advertisements. Broadcasters and political parties are similar in the sense that both, although nominally private entities, are in a position to hinder the exercise of other citizens' constitutional rights, in that case freedom of speech and in this case the right to vote. Requiring that such entities give the same protection to those constitutional rights that the government must give is a tempting solution, one which had in fact been adopted by the lower court in Columbia Broadcasting, *see* Business Executives Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971). However, that solution carries with it the price of interference with the First Amendment rights of the entities themselves, and it was in part on this ground that the Supreme Court reversed. 419 U.S. at 120-21. To the extent the conflict is the same in our case, it must be resolved in the same way.

achieving its political goals. We turn, then, to the question of whether the challenged formula meets this test.

B. *Justifications of the Challenged Formula.*

By far the greatest number of delegates (72 percent) are allocated according to the electoral college vote of the States. We upheld this as a basis of representation in *Bode*; and we pursue the matter further only because the justification for electoral college apportionment carries within it much of the justification for this entire formula. A State's share of the electoral college vote only roughly approximates its share of the population. It precisely reflects the relative importance of the state to the party in terms of winning the presidential election. As we stated in *Bode*, "the primary function of a national party convention . . . is to select among a field of available persons Presidential and Vice-Presidential candidates most competent to perform the duties of office, *yet capable of attracting a sufficient number of popular votes to carry the requisite number of States in the election.*" 452 F.2d at 1309 (emphasis added).

The "requisite number of States" is the number with a majority of electoral college votes. The delegates from those states will presumably know best what kind of candidate is likely to carry them. It may be helpful, or even necessary, to have running mates who actually come from those states. If so, it may be wise, especially if it is thought that delegates from other states may ignore this fact in favor of their "favorite sons," to "build in" for candidates from large states the advantage of large home-state delegations. Assuming, as we have, the constitutional validity of delegate allocation measures taken to improve the Party's chances for victory, this one is hardly irrational.

It could stand some improvement, of course. As between two states of equal electoral importance, a party

could more profitably focus its attention on the one in which it has a chance of victory. This purpose we think is rationally served by the victory bonus system. A state which has gone Republican in the past may do so again. If electoral college apportionment weights the vote of the states according to the value of the prize, the victory bonus system does the same according to the likelihood of winning it.

The victory bonus system may help to keep a state in the Republican camp not only by orienting party policies to that state's interests, but also by providing a reward and incentive for the efforts of that state's party organization. Whether or not it is an effective incentive, it may be the only one that a national party has to offer. In any case, having accepted the legitimacy of such party-strengthening measures, we can hardly say that it is irrational.

It is most rational, perhaps, with respect to the "proportionate" victory bonuses, since a likelihood of success is more important in a large state than a small one. Not surprisingly, then, it is the "uniform" bonuses which have come in for the severest criticism from plaintiffs, not to mention the district judge. But these, too, seem to us to be rationally conceived. Success in a given state may have a certain value to the party quite out of proportion to the state's size. When the returns are counted, on a state-by-state basis, carrying Arkansas will in a sense give the party the same psychological boost as carrying Tennessee (more than twice its size). And carrying a state, Arkansas or Tennessee, may also mean electing two Senators and a Governor on the presidential coattails. Holding these offices undoubtedly has a certain "uniform" importance to the party, in terms of the immediate power they represent and also because they are the springboards for future Presidential candidates. These considerations seem to

us adequately to justify the uniform victory bonus of six votes for success in a Presidential election. If the bonus for success in state level elections requires a separate justification, we think it is present in the need, which plaintiffs so heavily stress, to measure party strength by success in more than one past election.

Objection is also made to the allocations to the District of Columbia (14) and to Guam and the Virgin Islands (4 each). The fourteen delegates from the District of Columbia clearly represent disporportionately few voters, but do they disproportionately represent the importance of this particular governmental unit to the party? No one who has lived in the District can deny the special importance of political ambiance in the city in which the Nation's business is done. As for the territories, their four votes each will hardly comprise a decisive bloc at the convention; and the party might well have concluded that a delegation of four is the smallest that it makes any sense to bring the considerable distance to the convention site.

There are other justifications for the various elements of this formula, as there are certainly countervailing objections to the ones we have mentioned. The uniform importance of the states might be thought adequately reflected in electoral college vote. Their importance in terms of party strength could perhaps be more accurately reflected by allocating delegates according to the size of the party vote in past elections. And the chances for success in future elections might be maximized by paying more attention to "swing" states than "safe" ones. Yet it is the essence of the First Amendment rights, which the parties exercise. that they may make their own contrary (and rational) judgments without interference from the courts.

It is urged that this formula represents nothing more than an effort by party members from strongly Republi-

can states to perpetuate their control.[62] But it seems to us that the First Amendment protects their power to do precisely that. The Party could have chosen a delegate allocation scheme calculated to broaden its base, by giving special influence to delegates from States where the party is weak. Instead it appears to have chosen to consolidate its gains in states where it has been strong. We are not about to hold that this is an irrational way to seek political success. As for those aspects of the formula which treat the states on a uniform basis and thus give disproportionate influence to the smaller states, how could we say that they do not rationally serve the important cause of cohesiveness among the various state parties, when it took precisely such a scheme to bring about the union of the states themselves? [63]

We therefore hold that the formula does not violate the Equal Protection Clause. To the extent that voting rights are involved, warranting close judicial scrutiny, these rights are offset by the First Amendment rights exercised by the Party in choosing the formula it did. We must emphasize that this is only true because the formula rationally advances legitimate party interests in political effectiveness. The same might not always hold true. There are no racial or other invidious classifications here.[64] If there were, the Party's entitlement

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[62] Plaintiffs put special emphasis on this point, arguing that the delegates from overrepresented States, like legislators in a malapportioned legislature, can perpetuate their power indefinitely. They omit to mention that an apportionment based on Party vote could have precisely the same effect, if delegates from States where that vote has been high force the nomination of candidates that will keep it so, at the expense of the Parties in other States.

[63] *See* C. ROSSITER, PARTIES AND POLITICS IN AMERICA 12 (1960) (describing the national parties as no more than "loose confederacies of state parties").

[64] Plaintiffs have repeatedly stressed that particular states and regions are favored under the formula. This is only because the uniform and electoral college-based allocations of the formula tend

to constitutional protection would be as slight as those of the victims would be strong. Similarly, we have said that voting rights are not as heavily implicated in a nomination as in an election. It might be otherwise in a case where there is only one party with a realistic chance to win the election, and where a vote in the nominating process is the only effective vote that can be cast.[65]

These *caveats* have no significance in the present context other than to suggest that, although courts should be slow to interfere with the internal process of political parties, circumstances can be conceived of wherein they may grant relief. Where such circumstances do not ex-

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to favor small states, and the victory bonuses tend to favor strongly Republican states. Neither classification is invidious. The first is sanctioned in the Constitution, and all that is required to avoid the effects of the second is success at the polls.

[65] We may distinguish Gray v. Sanders, 372 U.S. 368 (1963), on this basis. It is clearly the Supreme Court case most closely in point. Having first announced the one person, one vote rule, it applied that rule to a primary election held to select candidates for state-wide offices. Georgia's practice of giving unequal weight to votes cast in different districts was invalidated. Justice Douglas reserved the question of whether the same would be true if nominations were made through a convention system. *Id.* at 378 n.10. We see no persuasive distinction on that basis (to the extent that convention delegates are bound by primary votes, the systems are identical), or on the basis of *Gray's* having involved nominations at the state rather than the national level. It was, however, a case dominated by the fact of one party rule in Georgia. The District Court had noted that it was "known to all that the Democratic candidate has, without exception, at least during the present century, been the choice of the voters at the General election." Sanders v. Gray, 203 F.Supp. 158, 167 (N.D. Ga. 1962). If another distinction is necessary, it is that the use of the weighted-vote primary could hardly be taken as an exercise of First Amendment rights by one of the parties. It was mandated by a state statute, applicable to all parties, and passed some forty-five years earlier. *See* Neill Primary Act, Georgia Laws 1919 p. 183, *repealed by* 34 GA. CODE ANN. § 2001 (1970); Sanders v. Gray, 203 F. Supp. at 159.

ist, *Georgia*, *Bode*, and this case should serve to discourage resort to this court for the resolution of intra-party differences.[66]

The judgment of the District Court is reversed, and the case is remanded with directions to dismiss the complaint.

*It is so ordered.*

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[66] The deference we have accorded to the defendant's political decisions should be sufficient to dispel the spectre that Judge Wilkey raises of a flood of further litigation on the eve of the 1976 conventions. No doubt his preferred disposition of a finding of no state action and no justiciability would do the job even more effectively, but by the same token it may go too far. The invidious discrimination and one party rule cases present difficult issues not present in this appeal and not necessary to its decision. We wish to reserve them.

We are not certain that Judge Wilkey has succeeded in doing so. He makes no reference to one party rule situations. In discussing state action he purports to reserve the case of racial or other invidious classification, which he appears to believe can always be dealt with by the doctrine that a lesser degree of a state involvement will support a finding of state action in such circumstances. As the complainants in *Moose Lodge* can testify, however, racial discrimination is not enough if the indicia of state action are otherwise lacking, and Judge Wilkey's opinion suggests that they are indeed utterly lacking here.

Judge Wilkey makes no reference to the indivious discrimination case in his discussion of justiciability, and his conclusions in that regard are so sweeping as to leave little room for it. Presumably, some way could be found to say that that case is justiciable while this one is not. Whether in doing so we could avoid the appearance of inconsistency or manipulation of the doctrine is another question. We spare ourselves these difficulties, and preserve a greater flexibility, by choosing a disposition on the merits, to which the same underlying considerations of political party autonomy so readily lend themselves.

MacKINNON, *Circuit Judge*, concurring: In my opinion, the Ripon Society has no standing to bring this suit, and I would therefore direct the dismissal of the complaint as to it. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 224 (1974); *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) ("[A] mere 'interest in a problem,' no matter how longstanding the interest and how qualified the organization is in evaluating the problem, is not sufficient by itself to [confer standing on the organization.]") Of course, the presence of the individual plaintiffs, who do have standing, means that Ripon's lack of standing is not fatal to this action.

With the above exception, I concur in Judge McGowan's opinion.

TAMM, *Circuit Judge*, concurring in the result: I agree with the disposition the court reaches, but believe that we must directly confront preliminary issues which the majority passes over to reach the merits. Specifically, we should reassess the vitality of our previous holding of governmental action in this area and recognize the full impact of the justiciability problems.

I

Eight individual registered Republicans and the Ripon Society, Inc. (collectively referred to as Ripon) challenge the delegate apportionment plan, Rule 30, adopted by the 1972 Republican National Convention for the 1976 Convention, as violative of the equal protection guarantee of the fifth and fourteenth amendments. In order to apply these constitutional restraints against the Republican National Party and Committee (Republican), Ripon must establish the presence of state or governmental action. To do so, Ripon principally relies upon two cases in this circuit which found the activities of the major political parties to constitute governmental action, *Georgia v. National Democratic Party*, 447 F.2d 1271 (D.C. Cir.), *cert. denied*, 404 U.S. 858 (1971) and *Bode v. National Democratic Party*, 452 F.2d 1302 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972). I was a member of the unanimous division in *Georgia*, where we stated that "in the absence of further explication by the Supreme Court on this point, we incline to the conclusion that the National Conventions are not so divorced from the activities of the states in conducting presidential elections as to negate the existence of state action." 447 F.2d at 1276. I believe that further Supreme Court pronouncements in the area strongly indicate that this position is no longer tenable.

In *Georgia*, we reached our "inclination" on two grounds. The first, involving a three-step analysis, be-

gan with the postulate, drawn from the *Texas White Primary Cases*,[1] that the activities of state political parties constitute state action "insofar as those activities touch upon the machinery whereby *candidates* are nominated by the parties to seek election to local or national office." 447 F.2d at 1275. Our second premise was that "a state party's action in selecting *delegates* to its national convention is also invested with state action since the delegates' primary function is the nomination of candidates for the nation's highest offices." *Id.* This premise was grounded on the assumption that delegate-selection processes were imbued with the same quality of state action as candidate-nomination processes; while recognizing that courts had divided on the question, we found the analogy "a close and compelling one." Finally, we reasoned that if "the action of the individual state parties in selecting delegates to participate in the presidential-nominating process constitutes state action, the collective activity of all the states' delegates at the national convention can be no less readily classified as state action." *Id.*

Our second ground was derived from the states' responsibility to conduct elections, pursuant to article I, section 1, and the twelfth amendment. Since the "electorate's choice in the general election is effectively restricted to the nominees of the two [major] parties," the states, by placing the major parties' nominees' names on the ballot, have adopted this narrowing process as integrally related to their election procedures. Therefore, we opined, "every step in the nominating process—especially the crucial determination of how many delegate votes each state party is to be alloted—is as much

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[1] Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

a product of state action as if the states themselves were collectively to conduct such preliminary conventions." [2]

In *Bode*, the division followed the *Georgia* state action holding. 452 F.2d at 1304-05. Notably, in neither case did we accord plaintiffs relief. However, the following year, this court intervened in an internal Democratic Party dispute over challenges to the California and Illinois delegations to the 1972 convention. *Brown v. O'Brien*, 469 F.2d 563 (D.C. Cir. 1972). The division had "no difficulty concluding that defendants' action against these delegates was state action," *id.* at 567, and found that the national parties' decisions to exclude certain delegates violated due process. Thereafter, the Supreme Court stayed our judgment. *O'Brien v. Brown*, 409 U.S. 1 (1972). In strong language, the Court noted its "grave doubts" as to the correctness of our action:

> We must also consider the absence of authority supporting the action of the Court of Appeals in intervening in the internal determinations of a national political party, on the eve of its convention, regarding the seating of delegates. No case is cited to us in which any federal court has undertaken to interject itself into the deliberative processes of a national political convention; no holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do relationships of great delicacy that are essentially political in nature. Judicial intervention in this area traditionally has been approached with great caution and restraint. It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for

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[2] 447 F.2d at 1276 (footnote omitted). While recognizing that the Supreme Court opinions supporting this theory arose in one-party states where nomination was tantamount to election, we did not believe that factor was enough to distinguish those cases.

> determining intra-party disputes as to which delegates shall be seated. Thus, these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties. Highly important questions are presented concerning justiciability, whether the action of the Credentials Committee is state action and, if so, the reach of the Due Process Clause in this unique context. Vital rights of association guaranteed by the Constitution are also involved. While the Court is unwilling to undertake final resolution of the important constitutional questions presented without full briefing and argument and adequate opportunity for deliberation, we entertain grave doubts as to the action taken by the Court of Appeals.

*Id.* at 4-5 (footnote and citations omitted). One month later, Justice Rehnquist stayed an earlier district court holding granting relief in the case *sub judice*, based in part on "the probability of error in the result below," citing the above quoted passage from *O'Brien*. *Republican State Central Committee v. Ripon Society Inc.*, 409 U.S. 1222, 1225-27 (1972) (Rehnquist, Circuit Justice).

Thus, the Supreme Court has strongly suggested that if confronted with the issue, it would reverse our holding on state action. Ripon disputes this characterization and contends that the Court's criticism in *O'Brien* was aimed at the time of our intervention and its focus on an internal party dispute, not the holding of state action. *See* Appellants' Memorandum pursuant to Order of March 19, 1975 at 14-15; Note, *Presidential Nominating Conventions: Party Rules, State Law and the Constitution*, 62 *Geo. L.J.* 1621, 1636-37 (1974). *Compare Cousins* v. *Wigoda*, 419 U.S. 477, 491 (1975) *with id.* at 494 (Rehnquist, J., concurring). However, we need not dispositively settle on one of these differing interpretations, for even assuming that *O'Brien* does not preclude re-

affirmance of our *Georgia* holding, other Supreme Court precedent and analysis have so eroded the analytical underpinnings of both alternative holdings that I believe we are no longer justified in adhering to them.

A

The first basis for our *Georgia* holding was that state political parties' activities concerning nomination of candidates constituted state action; we invoked the *White Primary Cases* to support this proposition. However, in *O'Brien*, the Court characterized those cases as involving claims of "invidious discrimination based on race in a primary contest within a single state." 409 U.S. at 4 n.1 (citations omitted). That is a dramatically different proposition than we drew from those cases. Moreover, we have been criticized, perhaps justifiably, for citing the *White Primary Cases* indiscriminately, without distinguishing between those which turned on fifteenth amendment rights and those which were based on equal protection. *See* Kester, *Constitutional Restrictions on Political Parties*, 60 *Va.L.Rev.* 735, 766 (1974). Upon further reflection, I think that the generalizations we culled from those cases rest on less than firm ground.

First, those cases all involved racial discrimination, a prime target of the fourteenth and fifteenth amendments, with the practical consequence that a lesser degree of involvement may trigger constitutional scrutiny. *See, e.g., Greenya v. George Washington University*, 512 F.2d 556, 560 (D.C. Cir. 1975); *Jackson v. The Statler Foundation*, 496 F.2d 623, 628-29 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975). No allegation of racial discrimination is at issue here. Second, the *White Primary Cases* all took place during a one-party era in Texas when nomination in reality was tantamount to election—the primary *was* the election. This is certainly not the situation at the national level.

Finally, the two *Nixon* cases involved state statutes which directly controlled the activity in question,[3] and *Allwright* and *Terry* were fifteenth amendment cases, involving the right to vote; because of the integral relation between the primary and election in the one-party state, the Court found a constitutional violation.[4] The appropriateness of invoking these cases in the case at bar becomes questionable as the importance of state authorizing statutes in the presidential nominating process appears tangential,[5] and as Rule 30 involves apportionment of delegates, not actual voting processes. Thus, the *White Primary Cases* are not strong authority for the general proposition we advanced in *Georgia*.

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[3] In *Nixon v. Herndon*, the Court struck down on equal protection grounds a Texas state statute explicitly barring blacks from participation in Democratic party primary elections. 273 U.S. 536, 540-41 (1927). After that decision, Texas passed a statute granting every political party in the state "the power to prescribe the qualifications of its own members . . . to vote or otherwise participate in such political party . . . ." The Democratic party adopted a "whites only" primary rule. The Court in *Nixon v. Condon* found that the power to determine qualifications derived from the statute, and the resolution excluding blacks was therefore state action in violation of the fourteenth amendment, 286 U.S. 70, 8589 (1932).

[4] In *Allwright*, primary eligibility had been determined by the party's convention. However, the Court in finding state action relied heavily on the state's detailed regulation of those primaries for its conclusion that the party was "an agency of the State in so far as it determines the participants in a primary election." 321 U.S. 649, 663 (1944). In *Terry*, the Court, though split on the proper analysis, extended its fifteenth amendment holding to the whites-only Jaybird Democratic Association which conducted a straw-vote election prior to each Democratic primary, the winner of which invariably triumphed in the Democratic primary and general election. 345 U.S. 461 (1953).

[5] At last count, nineteen states provided by statute, in one form or another, for presidential primaries. Nineteen other states have statutes providing for state political conventions from which delegates to the National Conventions are chosen, leaving the selection of delegates to state party rules. Twelve states have no statute whatever on the subject. Republican Supp. Br. at 13 n.5. Thus,

I also cannot extract a general rule from the other, arguably relevant, Supreme Court cases not directly relied upon in *Georgia—United States v. Classic*, 313 U.S. 299 (1941) and *Gray v. Sanders*, 372 U.S. 368 (1963). *Classic* reversed the dismissal of an indictment against a state election official for falsely counting primary ballots on the basis that primaries were such an "integral part" of the election process that the constitutional right to vote extended to them. However, the *Classic* holding was firmly gounded in the article I protection of the right to vote in congressional elections, which also extends to private interferences, and thus cannot stand for the proposition that all nominating procedures closely related to general elections constitute state action. 313 U.S. at 314-15; *see Developments in the Law—Elections*, 88 *Harv. L.Rev.* 1111, 1158-59 (1975). In *Gray*, the device attacked on equal protection grounds, the unit-voting system, was directly imposed on the Democratic party by statute if it chose to hold a primary. The finding that this proximate regulation of the challenged device constituted state action is unsurprising, but is also doctrinally different than the question presented by Rule 30. 372 U.S. at 374-75; *see* Kester, *supra*, 60 *Va. L. Rev.* at 763; *Developments*, *supra*, 88 *Harv. L.Rev.* at 1158 n.41.

Moreover, as the Supreme Court has recently made clear, the mere fact that the state regulates some aspects of an organization does not make its activities state action. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). There must be a sufficient nexus between the challenged action and the state regulation. *Jackson*

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at best, the degree of state action should vary from state-to-state. Moreover, none of these statutes bear on the issue *sub judice*, the allocation of delegates and whether that decision constitutes state action.

*v. Metropolitan Edison Co., supra*, 419 U.S. at 351. Clearly no such nexus exists between any state statute and the allocation of delegates to the Republican Convention. This conclusion is underscored by *Cousins v. Wigoda, supra*, where the Court found that the "states themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates. If the qualifications and eligibility of delegates to National Political Party Conventions were left to state law " 'each of the fifty states could establish the qualifications of its delegates to the various party conventions without regard to party policy, an obviously intolerable result.' " [6]

In sum, I must conclude that the first step that led to our conclusion that the decisions of national conventions were state action was an unjustified simplification and inconsistent with present authority.[7] Without

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[6] Cousins v. Wigoda, 419 U.S. 477, 489-90 (1975) (footnote omitted), *citing* Wigoda v. Cousins, 342 F. Supp. 82, 86 (N.D. Ill. 1972). The Court also noted recent proposals that the parties use regional or national primaries to choose these nominees. 419 U.S. at 490 n.9.

[7] *Cousins* also apparently undercuts the second step in our *Georgia* analysis—the analogy between delegate-selection processes and candidate-nomination processes. In disposing of the argument that Illinois was protecting its compelling interest in the electoral process, the Court stated:

> Consideration of the special function of delegates to such a Convention militates persuasively against the conclusion that the asserted interest constitutes a compelling state interest. Delegates perform a task of supreme importance to every citizen of the Nation regardless of their State of residence. The vital business of the Convention is the nomination of the Party's candidates for the offices of President and Vice President of the United States. To that end, the state political parties are "affiliated with a national party through acceptance of the national call to send state delegates to the national convention." *Ray v. Blair*, 343 U.S. 214, 225 (1952).

419 U.S. at 489. This singling out of convention delegates' "unique task" dissipates the strength of the analogy we relied upon in

this syllogistic prerequisite, our first state action holding must fall.

B

Our alternative state action holding was based on the electoral process itself. The lynchpin in that argument is the states, by adopting as a necessary adjunct of their election procedures the narrowing process performed by the parties through placing the party nominees' names on the ballot, have made the parties' activities their own. Since the *Georgia* decision, the Supreme Court has held that the states have a compelling interest in enforcing this narrowing process. *See American Party of Texas v. White*, 415 U.S. 767, 780-81 (1974); *Storer v. Brown*, 415 U.S. 724, 736 (1974). All of those cases, however, dealt with actions taken by the states themselves and were unaccompanied by any state action question.[8] In fact, the only relevant recent Supreme Court decisions point in a direction opposite to our *Georgia* conclusion.

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*Georgia*. *See also* Smith v. State Exec. Comm. 288 F. Supp. 371, 374-76 (N.D. Ga. 1968). Note, *One Man, One Vote and Selection of Delegates to National Nominating Conventions*, 37 *U. Chi. L. Rev.* 536, 538-45 (1970). Note, *Constitutional Safeguards in the Selection of Delegates to Presidential Nominating Conventions*, 78 *Yale L.J.* 1228, 1232-35 (1969). *Cf.* Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965). Irish v. Democratic-Farmer-Labor Party, 287 F.Supp. 794, 802-03 (D.Minn.), *aff'd*, 399 F.2d 119 (8th Cir. 1968). *But see* Maxey v. Washington State Democratic Comm., 319 F. Supp. 673 (W.D. Wash. 1970).

*Cousins* also clouds the correctness of the third step in the *Georgia* analysis. If the states cannot enforce the results of their primaries, there is some question whether the acts of national conventions should be considered those of the states acting in concert.

[8] The Court has also recognized that the states cannot constitutionally effectuate their interest in a manner which too rigidly restricts access to the ballot and electoral process. *See, e.g.*, Bullock v. Carter, 405 U.S. 134 (1972); Moore v. Ogilvie, 394 U.S. 814 (1969); Williams v. Rhodes, 393 U.S. 23 (1968).

In *Jackson v. Metropolitan Edison Co., supra,* petitioner challenged a utility's termination of a customer's service on due process grounds, alleging, *inter alia,* that state action was present because the termination had been performed pursuant to a tariff accepted by the state. The Court, rejecting this suggestion, found that "[a]pproval by [the state] . . . where [it had] not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the [state] into 'state action.'" 419 U.S. at 357. The Court held that where the initiative comes from the private party no state action was present.

Similarly, every action taken by any individual which aids the state in its narrowing function cannot be deemed state action; the connection between the public and private entities must be more specific and direct. That connection is not present here. The nominating function is not one traditionally performed by the states, nor are they particularly interested in the mechanics of the narrowing process, so long as by the general election, the size and complexity of the ballot is within reason. Thus, it is impossible to conclude that the national conventions are performing a delegated governmental function. In fact, by adopting a platform and promulgating rules to govern their party and by choosing a standard bearer who best represents the party's ideologies and preferences, delegates are engaged in activities with which the first amendment bars most governmental interference. When this analysis is coupled with the *Cousins* holding that the state cannot enforce its supposed interests against the national party, I must conclude that the necessary integral relationship between Rule 30 and the states is lacking.[9]

[9] It should also be noted that in many states, the national party nominee is placed on the ballot only after certification by the state party. *If* there is a constitutional violation in these procedures,

The fact that neither of the *Georgia* holdings are now tenable does not end the state action analysis, since there is another possible source of governmental involvement in this area—the federal government. Recent years have seen the increasing regulatory and financial involvement by the federal government in the electoral process, culminating in the Federal Election Campaign Act Amendments of 1974, P.L. 93-443, 88 Stat. 1263.

Under the present version of federal regulations,[10] the major parties' conventions, starting in 1976, will probably be totally funded by federal funds. *See id.* at 1294, *as codified Int. Rev. Code* of 1954 § 9008. While the argument could be made that this grant of federal money makes the actions of the convention subject to constitutional scrutiny, the circuit courts have held time and again that, absent a finding of racial discrimination, the mere receipt of government funds is not enough to dictate that finding. *See, e.g., Greenya v. George Washington University, supra; Junior Chamber of Commerce v. Missouri State Junior Chamber of Commerce,* 508 F.2d 1031, 1033-34 (8th Cir. 1975); *Whaba v. New York University,* 492 F.2d 96 (2d Cir. 1974). There must be a sufficient nexus before the government can be considered a joint participant in the challenged activity. *See Moose Lodge No. 107 v. Irvis, supra; Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961). The funding of the conventions does not supply that joint participation in the case *sub judice,* since the

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it is not the certification, but the state's grant of automatic ballot access to the major parties' candidates. The remedy should not be to interfere with the associational activities of the national parties, but to deny their candidate the advantage in securing a place on the state's ballot. *See* Kester, *Constitutional Restrictions on Political Parties,* 60 *Va. L.Rev.* 735, 767 (1974).

[10] The constitutionality of these provisions is now under attack in *Buckley v. Valeo*—No. 74-1061 (D.C. Cir. filed Jan. 2, 1975); we express no conclusions about the issues in that case.

funding is authorized regardless of the procedures the convention adopts.

Similarly, the federal regulatory presence is not sufficient to trigger a governmental action finding. The regulation, presently constituted, has no connection with the activities in question [11] and does not meet the level the Court in *Jackson* indicated is necessary for a finding of governmental action. Further, the regulation is not sufficiently detailed, nor are the benefits the federal government derives from the conventions' activities significant enough, so that we could find the existence of a symbiotic relationship or constitutionally recognizable "entanglement" between the entities. *Compare Howard University v. National Collegiate Athletic Ass'n*, 510 F.2d 213 (D.C. Cir. 1975).

In summary, I must conclude that Ripon cannot demonstrate the presence of governmental action in the adoption of Rule 30. Therefore, I must concede that our holding in *Georgia* was in error. The problem of "state action" has always been doctrinally a difficult and unsatisfying one; a commentator has called state action "a conceptual disaster area." [12] Recent Supreme Court decisions have, however, clarified the standards we must apply in this area, and those standards dictate the conclusion that I believe we must reach here.

By this conclusion, I do not foreclose all possibility that an action taken by a major political party or its national convention will be judged to be subject to constitutional restraints; I endorse the evolving doctrine that in racial

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[11] Of course, the associational interests identified in *Cousins* may preclude such regulation, a question explicitly left open by that opinion. 419 U.S. at 483 n.4.

[12] Black, *The Supreme Court—Foreward*, 81 *Harv. L.Rev.* 69, 95 (1967).

discrimination situations, a lesser quantum of governmental involvement will trigger constitutional scrutiny. In this situation, however, I would vote to reverse the judgment of the district court for lack of jurisdiction. Since the majority of this court avoids confronting this difficult question by assuming jurisdiction, I am compelled to turn now to another issue which requires scrutiny before consideration of the merits, and which the majority also glosses over—justiciability.

II

"Justiciability is itself a concept of uncertain meaning and scope." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). It is "not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures. . . ." *Poe v. Ullman*, 367 U.S. 497, 508 (1961). While its applicability to the so-called "political question doctrine" has been eroded, *see, e.g., Powell v. McCormick*, 395 U.S. 486 (1969), *Baker v. Carr*, 369 U.S. 186 (1962), there is no reason to assume its demise. *See Gilligan v. Morgan*, 413 U.S. 1, 11 (1973).

Confronting the question of justiability in *Georgia* of a claim similar to the one *sub judice*, we found judicial review appropriate because:

> courts are competent to scrutinize the allocation schemes promulgated by the national parties in order to determine whether, given the context of political partisanship out of which such formulas necessarily arise, substantial deviations from equality of voting power at the Conventions are supported by legitimate justifications.

447 F.2d at 1278 (footnote omitted). The passage of the Supreme Court's opinion in *O'Brien*, set out on page 4 *supra*, cited with approval by Mr. Justice Rehnquist in his *Ripon* opinion, casts doubt about our justiciability holding. Upon reconsideration, I conclude that we have

failed to face the import of the justiciability problems in this area.

In *Baker v. Carr, supra*, 369 U.S. at 217, the Court listed factors which would make a claim a non-justiciable political question; two of those factors expose directly the inherent difficulty in a court's reviewing a delegate allocation formula for national political conventions—the lack of judicially discoverable and manageable standards and the impossibility of reaching a decision without an initial policy determination of a kind clearly for non-judicial discretion.

A. *Lack of Judicially Discoverable and Manageable Standards*

In *Georgia*, we opined that we could determine "substantial deviations from *equality of voting power*" (emphasis added); since we rejected plaintiff's claim in that case, we were never forced to define the test precisely. In fact, I am afraid that our *Georgia* test is more promise than reality and could never be applied accurately to a challenge to any delegate allocation formula.

First, it is impossible to define the constituency whose equality of voting power we are attempting to protect. None of the obvious possibilities is satisfying. The most obvious is the class of registered members of the particular party; however, at the national level, both parties to succeed must reach beyond these mostly dependable adherents to gain the temporary allegiance of the so-called independent vote. In fact, to force the Republicans to define its constituency as its registered members would consign the party to minority status.

Using voting results is equally unsatisfying. As we recognized in *Bode*: "Elusive too is the utilization of past voting patterns—transitory political phenomena—to ascertain the current population to be represented at a national

convention." 452 F.2d at 1307 (footnote omitted). The final possibility is to define the relevant constituency as all voters, but to impose that criterion on a party would be to deny it any ideological choice, a choice which lies at the heart of the party's first amendment associational freedoms. Thus, although they did not recognize the full implication of its analysis, the *Bode* division's comments are apt: "the individual to be represented [is not] identifiable except in a loose, conceptual sense. . . . To identify and count potential Democrats is impossible, requiring desirable but unavailable clairvoyance." 452 F.2d at 1306-07.

The second undefinable standard is the determination of the basis against which a party's delegate allocation plan is to be tested, even assuming the relative constituency could be ascertained. "One man, one vote" principles, as our brethren concede, do not apply. The Court has held that those stringent standards bear only on bodies which exercise general government powers. *See, e.g., Salyer v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973); *Hadley v. Junior College District*, 397 U.S. 50 (1970).

Without belaboring the point, nominating conventions do not meet this criterion. Neither the writing of platforms nor the nomination of candidates is a governmental function. A convention is not a representative body.[13] Delegates need not be elected. Once at the convention, subject to certain state statutes, instead of representing any constituency, they are "free agents," able to coalesce around any candidate or issue of their choosing. Finally, any representative role they may have can be completely

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[13] One important difference is that unlike an official elected to a governmental body, a delegate selected to attend a national convention apparently cannot force that body to seat him. *Compare* Powell v. McCormick, 395 U.S. 486 (1969) *with* Cousins v. Wigoda, *supra* note 6.

under cut if the convention exercises its right not to seat them. *Cousins v. Wigoda, supra; cf. Zimmer v. McKeithen*, 485 F.2d 1297, 1304 n.15 (5th Cir. 1973) (*en banc*). *See also Education/Instruccion, Inc. v. Moore*, 503 F.2d 1187 (2d Cir. 1974), *cert. denied*, 419 U.S. 1109 (1975), *Davis v. American Telephone and Telegraph Co.*, 478 F.2d 1375 (2d Cir. 1973).

Hence, what this boils down to is: if the proper constituency could be determined, which it cannot satisfactorily, and if the basis for equality could be settled upon, which would not include one-man, one-vote principles, then perhaps the court could scrutinize "deviations" to ensure they are based upon "legitimate justification." However, even this inquiry is infeasible, since it involves the court in political policy determinations.

B. *Policy Determinations Requiring Non-Judicial Discredit*

Political parties are formed for two major purposes—(1) to associate with people of like ideological persuasion and (2) to attempt to implement their ideological goals by electing candidates who share that objective. Both functions are protected under the first amendment. Their effectuation depends on a series of political choices made by its members.

In fact, it could fairly be said that a party's twin objectives of ideological purity and electoral success are often incompatible and that a party must strike a compromise between both goals or opt for one at the expense of the other. For example, the results of the 1972 Democratic and 1964 Republican Presidential campaigns may be partially explained by the parties' decision to seek ideological purity at the expense of electoral attractiveness.

Judge McGowan's opinion advances some of the justification and political choices which underlie the bonus sys-

tems attacked by the plaintiffs in this case. The crucial point is that all these potential decisions—whether to reward the ideological faithful, farmer or urban dweller or whether to encourage electoral success by rewarding those local parties which actually carry the ticket—are essentially political accommodations. As such, they are a fundamental exercise of first amendment rights; second-guessing of their accuracy by the judiciary is both impossible and an unwarranted deviation from our constitutional scheme.

Moreover, there already exists a correcting mechanism in the system—the ballot box. So long as political parties exist to elect candidates and effectuate programs, they will never be overly exclusionary too long. The judiciary need not and should not paternalistically interfere with this process.[14]

This posture of non-interference has been followed by courts hearing claims involving party affairs. The Eighth Circuit, declining to reapportion the Minnesota delegates to the Democratic National Convention, found the case to be a non-justiciable political question. *Irish* v. *Democratic-Farmer-Labor Party*, 399 F.2d 119, 121 (8th Cir. 1968). Similarly, the district court in *Smith* v. *State Executive Committee*, 288 F. Supp. 371, 376 (N.D. Ga. 1968) denied relief, *inter alia*, on the basis that "there is no known case to the effect that any jurisdiction exists over the internal rules or management of a political party." Finally, the Third Circuit, in recently reversing a district court decree enjoining a state party's delegate allocation to its party convention, stated:

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[14] A caveat—this case does not concern invidious exclusion, such as race, alienage or national origin. Such a case might change both the previously discussed state action analysis and the appropriateness of judicial interference. However, we intimate no views concerning the ultimate disposition of such a case without the benefit of a concrete factual context before us.

> If a given party chooses to organize by districts, but to allocate delegate strength to a district in which it has fewer numbers but a greater opportunity to achieve the practical advancement of the political ideas for the pursuit of which the association was formed, state action which frustrates that choice is highly suspect.

*Redfearn v. Delaware Republican State Comm.*, 502 F.2d 1123, 1127-28 (3rd Cir. 1974). *See also Lynch v. Torquato*, 343 F.2d 370 (3rd Cir. 1965).

I would concur in those assessments and conclude that the question plaintiffs present is non-justiciable.[15]

III

I have no quarrel with the majority opinion on the merits. Were I to reach them, I would find Judge McGowan's opinion both attractive and persuasive. However, despite the best attempts to deter further litigation, I fear that by "reserving" the questions of state action and justiciability, the majority make such litigation inevitable. For my part, since I find the requisite state action necessary for plaintiff's jurisdiction lacking, I would rest our decision on that, more conclusively final, ground. I, therefore, concur in the result of reversing the district court with directions to dismiss the complaint.

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[15] In *Georgia*, we also took note of a lesser justiciability test from *Baker v. Carr*:

> Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to the courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, *that a discrimination reflects no policy, but simply arbitrary and capricious action.*

447 F.2d at 1277, *citing* 369 U.S. at 226. If state action were shown, I agree that we could scrutinize even delegate allocation schemes for totally arbitrary action. However, plaintiffs do not, as they clearly cannot, make that claim, but argue that the deviations are not legitimately justifiable. That claim is non-justiciable under *Baker*.

Wilkey, *Circuit Judge*, with whom joined Senior Judge Danaher, concurring: Although we are in agreement that the judgment of the District Court must be reversed insofar as it grants appellants relief, we would reach that result on the threshold issues of "state action" and "justiciability" and not on the merits of appellants' claims. We recognize that this court in 1971 held in *Georgia* v. *National Democratic Party* [1] that the allocation of delegates by a national political convention was "state action" within the meaning of the Fourteenth Amendment and represented a justiciable controversy, and that those holdings were reaffirmed shortly thereafter in *Bode* v. *National Democratic Party*.[2]

In the interim since, however, the Supreme Court in *O'Brien* v. *Brown* [3] expressed "grave doubts" about our disposition of an analogous case dealing with seating of delegates at the 1972 Democratic National Convention. A stay, issued by Mr. Justice Rehnquist in his capacity as Circuit Justice, dealing with the allocation plan pres-

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[1] 145 U.S. App. D.C. 102, 447 F.2d 1271, *cert. denied*, 404 U.S. 858 (1971).

[2] 146 U.S. App. D.C. 373, 452 F.2d 1302 (1971), *cert. denied*, 404 U.S. 1019 (1972).

[3] 409 U.S. 1 (1972). The Supreme Court has also in the interim decided the cases of *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), and *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972). In the former case the Court held that the termination of service by a heavily regulated utility with something approaching monopoly power was not state action, absent some actual connection between the state and the termination of service. In the latter case the Court held that the refusal of a private club to serve a black guest at its dining room and bar did not constitute "state action" despite the fact that the state licensed the club to serve liquor and regulated the club in some particulars unrelated to the discriminatory practices. These two cases are arguably distinguishable on their facts, but their thrust does reinforce our conclusion, developed independently, that the states are not sufficiently involved in the actions of the national political conventions.

ently before us, also called into question our opinions in *Georgia* and *Bode*.[4] As a result, a reassessment of our prior opinions is definitely in order.

Aside from concern as to the substantive correctness of our previous views, we find the majority's refusal to consider and resolve in this *en banc* proceeding the state action and justiciability issues posed by this case to be unwise judicial policy. By failing to resolve these issues in a case brought sufficiently in advance of the 1976 national conventions to permit adequate deliberation, we doubtless will face the unenviable task of resolving these questions on the eve of a national convention under time constraints and other pressures that would make reasoned deliberation difficult, if not impossible.

I. *State Action*

The initial threshold question posed by this challenge is whether there was sufficient governmental involvement in the allocation of delegates to the 1976 Republican National Convention to trigger application of the equal protection guarantees of the Fifth and Fourteenth Amendments.

In our opinion in *Georgia* v. *National Democratic Party* we relied on two rationales for our conclusion that the allocation of delegates by a national political party constituted "state action." The first rationale involved a three-part syllogism.[5] First, we noted that "state action" inheres in the participation of state parties in candidate nomination by state-wide primary election. In support of this proposition reliance was placed upon the

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[4] *Republican State Central Committee of Arizona* v. *Ripon Society, Inc.*, Application for Stay, No. A-179 O.T. 1972, 409 U.S. 1222 (1972).

[5] 145 U.S. App. D.C. at 105-06, 447 F.2d at 1274-75.

Texas White Primary line of cases [6] and the more recent Supreme Court opinion in *Gray* v. *Sanders*.[7] Given the premise, we said secondly that the state party's action in selecting delegates to its national convention is also invested with "state action," since the delegates' primary function is to nominate candidates for the two national offices. Finally, if the activity of individual state parties in selecting delegates to participate in the nomination process is "state action," the collective decisions made by all these delegates once assembled must constitute "state action."

Our second basis in *Georgia* for finding "state action" was derived from the fact that most, if not all, states utilize the national political conventions in order to limit the electorate's choice in the general election,[8] *i.e.*, the narrowing process. The party nominating process was thus thought to be state action either (1) because the parties by engaging in the narrowing process are undertaking a governmental task akin to conducting a primary election, or (2) because the states ratify the result of the convention through the automatic placement of its nominees on the general election ballot.

The opinion in *Bode* merely reasserted the conclusions reached in *Georgia* that any "decision made by the Democratic Party at the national level . . . is tantamount to a decision of the States acting in concert. . . ." [9]

In view of the Supreme Court's recent pronouncements, we are now of the view that the rationales articulated in *Georgia* and followed in *Bode* were incorrect, and

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[6] *Nixon* v. *Herndon*, 273 U.S. 536 (1927); *Nixon* v. *Condon*, 286 U.S. 73 (1932); *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Terry* v. *Adams*, 345 U.S. 461 (1953).

[7] 372 U.S. 368 (1963).

[8] 145 U.S. App. D.C. at 107, 447 F.2d at 1276.

[9] 146 U.S. App. D.C. at 375, 452 F.2d at 1304.

that the actions of the national political conventions *per se* are not sufficiently infused with state involvement to trigger constitutional protections except in the context of racial or other invidious discrimination.[10]

Our primary difficulty with the first ground of the *Georgia* opinion focuses upon the jump between premise two and the conclusion. Even if it be conceded *arguendo* that "the state's *delegate*-selection processes are imbued with the same quality of state action found in *candidate*-nomination processes . . . ," [11] it does not follow that the actions of delegates selected at such elections are "state action" merely because they were chosen at a primary which is subject to constitutional constraints.

Party participation in the electoral process is subject to constitutional safeguards because *that* process is permeated by state regulation. In *Gray* v. *Sanders*, for example, the Court held the Georgia Democratic primary election to be subject to an equal protection attack because Georgia "collaborates in the conduct of the primary, and puts its powers behind the rules of the party." [12]

The actions of a national political convention or committee are distinguishable because they are not similarly

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[10] As we indicated earlier in *Greenya* v. *George Washington University*, —— U.S. App. D.C. ——, ——, 512 F.2d 556, 560 (1975), we are in agreement with Judge Friendly that racial and other invidious discrimination is peculiarly offensive to the Fourteenth Amendment, hence a lesser degree of state involvement may constitute "state action" in that context. Although we are not faced with such a case here, we specifically note that our views on "state action" might well be different if the issue arose in a case presenting a claim of discrimination on the basis of race, religion, national origin, or sex. *Accord*, *Weise* v. *Syracuse University*, —— F.2d —— (2nd Cir. 14 July 1975) (Slip Op. pp. 47-50-53).

[11] 145 U.S. App. D.C. at 106, 447 F.2d at 1275 (emphasis in original).

[12] 372 U.S. 368, 374 (1963), *quoting from Chapman* v. *King*, 154 F.2d 460, 464 (5th Cir.), *cert. denied*, 327 U.S. 800 (1946).

permeated by governmental involvement or regulation. There is no law, state or federal, *requiring* a national party political convention. Neither the Federal Government nor any of the States seek to dictate the manner in which a national political convention adopts its platform or its nominees.[13] Similarly, there is no governmental involvement at all with the delegate allocation process. The *formula* here under review was purely the product of party deliberations and actions and was neither compelled, restricted, modified, devised, or encouraged by any state statute or ordinance. The national party decision being challenged in this case is thus not "in reality, the decisions of the states acting in concert." [14] It is rather private action by party delegates and officials. They may have been selected by a process that was sufficiently regulated by a state government to call into play constitutional restrictions at the selection stage. However, this connection alone is simply too tenuous to trigger the Equal Protection Clause.

Turning to the second ground advanced in the *Georgia* opinion, we question both the premise and conclusion. There can be no doubt that as a historical matter the nominees of the Republican and Democratic parties have had a monopoly on national office since 1852. Whether their monopoly will continue into the future has been questioned by some [15] and is not particularly material for

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[13] It is, in fact, doubtful that any such scheme of state or federal regulation would be constitutional. In view of the First Amendment associational rights involved, governmental regulation could only be in furtherance of a compelling interest and even then would have to be tailored to be least restrictive of the associational rights involved. *Compare Cousins* v. *Wigoda*, 419 U.S. 477 (1975).

[14] 145 U.S. App. D.C. at 106, 447 F.2d at 1275

[15] *See, e.g.*, D. Broder, *The Party's Over* (1971).

present purposes, because if that monopoly continues it will not be the result of governmental action. The recent *Ballot Access Cases* of the Supreme Court have recognized compelling state interests in limiting party and candidate access to the ballot.[16] However, they have also recognized that the states are not permitted to freeze in the two major parties nor set down requirements that so burden access by independent candidates and new parties that they would not be permitted ballot access despite significant public support.[17] We are thus led to conclude that if the Republicans and Democrats continue to dominate Presidential politics it will be because the vast majority of the voters will continue to feel that the nominees of those parties deserve their support and their votes, and not because state election laws maintain them in power.

Each major (or minor) party is free to adopt whatever scheme it desires—convention, national primary, or lottery—in the selection of its candidates for national office. That the states utilize the national party convention choices as the party nominees to go on the ballot, instead of requiring a petition or other device, does not retroactively transmute the national convention nominating process into state action. In *Jackson* v. *Metropolitan Edison Co.*,[18] where the state had accepted a tariff filing by the utility containing a proviso for termination of service without a hearing, the court con-

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[16] *American Party of Texas* v. *White*, 415 U.S. 767, 782 n. 14 (1974).

[17] *Williams* v. *Rhodes*, 393 U.S. 23, 32 (1968) ("The fact is, however, that the Ohio system does not merely favor a 'two-party system'; it favors two particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly."); *American Party of Texas* v. *White*, 415 U.S. 767 (1974). Cf. *Lubin* v. *Panish*, 415 U.S. 709 (1974) (exclusion of an indigent from the ballot because of an inability to pay a fixed fee).

[18] 419 U.S. 345 (1974).

cluded that approval by the state of the regulated utility's privately selected termination procedure did not "transmute a practice initiated by the utility and approved by the Commission into 'state action.' " [19]

Neither state nor federal government has ordered any political party to hold a national convention, nor prescribed the method of selection or allocation of delegates to be employed in 1976. The Republican National Committee's chosen method of allocation is a purely private choice. "[E]xercise of the choice allowed by state law where the initiative comes from it and not the state, does not make its action in doing so 'state action' for the purposes of the Fourteenth Amendment," [20] so held the *Jackson* Court.

Whatever the states' interest in narrowing the field of Presidential candidates, it by no means logically follows that the narrowing process thus becomes a state *function.* The function is performed by private parties on their own initiative, and for their own purposes. The constitutional right of association protects the parties and persons involved in so doing. While not deciding specifically the issue of delegate allocation, the Supreme Court in *Cousins* v. *Wigoda* [21] made it abundantly clear that the individual states are powerless to impose their will on a national party nominating convention in any manner that would interfere with the almost unfettered discretion of the parties in naming candidates.

Feeble indeed is the "state function" which no state has the power to control. Thus would seem to perish the claim that the Republican National Convention's allocation of delegates is in any way a "state function."

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[19] 419 U.S. at 357.

[20] *Ibid.*

[21] 419 U.S. 477 (1975).

We would reject—had it been offered—any claim that the recent amendment to the Internal Revenue Code [22] as to federal financing of national political conventions has imported an element of governmental involvement. Rather, considering the financing scheme *alone*, we deem our recent opinion in *Greenya* v. *George Washington University* [23] to be controlling. After reviewing the cases discussing this issue and the relevant arguments, the court concluded that "[w]ith the possible exception of racial discrimination by recipients of government funding, . . . mere financial support for particular projects also represents insufficient government involvement [to entail application of First or Fifth Amendment guarantees]." [24]

Considering the financing scheme cumulatively along with the other elements of government involvement previously discussed does not require a different result. Those other possible aspects of government involvement all emanate from the states and therefore cannot simply be added to federal financing to change the private character of the conventions. The Congress has sought to exercise no control over the conventions' governance or deliberations, hence there is no nexus between the complaint of plaintiffs, malapportionment of delegates, and the financing arrangement. The Congress would be quite surprised to learn that federal financial support had the effect of changing the conventions into governmental entities.

In addition, there are countervailing associational rights that must be considered in drawing the "state action" threshold. "The right of members of a political

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[22] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 406, *to be codified as* Int. Rev. Code of 1954, § 9008.

[23] 512 F.2d 556 (1975).

[24] 512 F.2d at 560.

party to gather in a national political convention in order to formulate proposed programs and nominate candidates for political office is at the very heart of the freedom of assembly and association which has been established in earlier cases decided by the Court." [25] As a result, courts should be reluctant to subject the conventions to constitutional restraints. Such a reluctance reinforces our conclusion that there is no "state action" involved when the political parties apportion their convention delegates.

II. *Justiciability*

The second threshold issue posed by this case is whether a challenge to the formula by which a national political convention allocates its delegates among the various states presents a nonjusticiable "political question." As with a finding of insufficient "state action," a finding of nonjusticiability here obviates the necessity—indeed, the propriety—of deciding the merits of plaintiffs' claims.

In an earlier phase of this case Ripon Society obtained in the District Court an injunction against the use by the Republican Party of the "bonus" formula for allocation of delegates to the party's 1972 convention.[26] That injunction was stayed by Mr. Justice Rehnquist on the ground of, *inter alia*, "the probability of error in the result below." [27] He based his reasoning on the following passage from *O'Brien* v. *Brown*: [28]

> No case is cited to us in which any federal court has undertaken to interject itself into the deliberative

[25] *Cousins* v. *Wigoda*, 419 U.S. 477, 491 (1975) (Rehnquist, J., concurring).

[26] *Ripon Society, Inc.* v. *National Republican Party*, 343 F. Supp. 168 (D.D.C. 1972).

[27] *Republican State Central Comm. of Arizona* v. *Ripon Society, Inc.*, 409 U.S. at 1225.

[28] 409 U.S. 1 (1972).

> process of a national political convention; no holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do, relationships of great delicacy that are essentially political in nature. [Cite] Judicial intervention in this area traditionally has been approached with great caution and restraint. [Cites] It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated. Thus, these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties. *Highly important questions are presented concerning justiciability, whether the action of the Credentials Committee is state action,* and if so the reach of the Due Process Clause in this context. *Vital rights of association guaranteed by the Constitution are also involved* . . . . [W]e entertain grave doubts as to the action taken by the Court of Appeals.[29] (Emphasis added.)

*O'Brien* did not involve the question of the overall apportionment of delegates to a party convention; rather, the issue was which of two rival slates of delegates from one state should be seated. Nevertheless, in *Republican State Central Committee of Arizona* v. *Ripon Society, Inc.*,[30] Justice Rehnquist was undoubtedly correct in his perception that there is little practical or legal difference between judicial interference with a party's seating of delegates at the time of the convention and its apportionment of delegates prior to the convention. Both are highly political questions, and their answers lie at the core of how the party perceives itself now and how it would like to present itself in the future.

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[29] *Id.* at 4-5, quoted in 409 U.S. at 1226-27.

[30] 409 U.S. 1222 (1972).

Any doubt as to the importance the Supreme Court attaches to the freedom of a party convention to determine its own composition was put to rest recently in *Cousins* v. *Wigoda*.[31] Relying heavily on the freedom of association of individuals in the political decision-making process, the Court held that a state had no power to dictate to a party which delegates it should take from that state—regardless of the fact that the slate chosen by the convention had not been sanctioned in accordance with state law. Central to the Court's decision was the recognition that a party's choice of its associates in large measure molds its political beliefs and ideas.[32] This is particularly true of the party's quadrennial convention. What the convention decides—not only as to Presidential and Vice-Presidential nominees, but also as to party organization and ideology for the next four years—is primarily determined by who is permitted by the party to come to it.

Political parties are formed for the purpose of advancing certain commonly held ideas of individuals. These individuals have always enjoyed the right to structure the party in such a way as to seek to insure that those ideas should be perpetuated. A critical factor in this structuring process is the determination of which elements of the electorate as a whole are or could be most receptive to the party's viewpoint and programs. If the party, for example, were to decide that only individuals in rural areas can sympathize with its platform and determines to accept delegates only from such regions, clearly the party cannot be forced to accept delegates from urban areas as well without suffering a gross infringement of its right of free expression and association. As a matter of political influence—indeed, of political survival—it might well be suicidal for the party

[31] 419 U.S. 477 (1975).

[32] *Id.* at 487.

to shut out urban opinion from its deliberations on candidates and platform; but certainly no decision is more personal to the party and less appropriate for judicial interference than its choice of maintaining ideological purity at the possible cost of minimizing political effectiveness.

The direction—the nominees and the platform—the party takes at a convention is in large measure a function of whom it allows as delegates. From a constitutional perspective, the judiciary can no more prescribe the composition of the convention than it can dictate the make-up of the party, its political beliefs as stated in the platform, or its nominees.

At the same time, it is important to note that, at least in this country, most political parties are not content simply to profess a particular ideological bent. They want to win elections as well. If the political decisions they make—as to candidates, platforms, and delegate apportionment—are not vindicated at the polls, they are likely to amend their posture in an endeavor to achieve more satisfactory electoral results. To the extent that a party fails to represent the "people's choice," therefore, the party itself can be expected to remedy the situation. If it does not, other parties will be quick to capitalize on its error. In short, the electoral process makes the parties largely self-regulatory; their errors as to the will of the majority are largely self-corrective.

This does not mean, of course, that every political party will, or should, attempt to represent every interest in American society, or even every interest within the party itself. It may well be that in its zeal to appeal to a large cross-section of the populace the party will lose the support of that segment which in the past has given it its most loyal backing. Also, its ideological position may become so homogenized that the public loses

confidence in the party's political integrity. If the party tries to stand for everything, it may wind up standing for nothing in the public mind. The questions of how far the party can afford to spread its ideology and of where its best support lies in the populace are archetypally political in nature. The courts have absolutely *no standards*—even assuming they have the right—to make such decisions.[33]

At least two of the formulations of the "political question" doctrine laid down by the Supreme Court in *Baker* v. *Carr*[34] are directly pertinent to this case. One bars entertainment of a suit if the court finds "a lack of judicially discoverable and manageable standards for resolving [the controversy]."[35] The other, closely related, formulation requires the court to stay its hand when faced with "the impossibility of deciding [controversy] without an initial policy determination of a kind clearly for nonjudicial discretion."[36] Although troubled by the problem, this court in *Georgia* found a "manageable standard" for review of the Democratic Party's delegate allocation formula in the "one man, one vote" requirements of the reapportionment decisions.[37] We concluded:

> The principle which renders the questions raised in this litigation justiciable is that courts are com-

[33] Nevertheless, this court found in both *Georgia* and *Bode* that the judiciary was fully empowered to exercise oversight with regard to the delegate allocation formulas of political party nominating conventions. We did not feel at that time, prior to the Supreme Court's decisions in *O'Brien* and *Cousins* v. *Wigoda*, that nonjusticiability presented a bar to our intervention in such intra-party decision-making.

[34] 369 U.S. 186 (1962).

[35] *Id.* at 217.

[36] *Ibid.*

[37] 145 U.S. App. D.C. 102, 108-09, 447 F.2d 1271, 1277-78 (1971).

> petent to scrutinize the allocation schemes promulgated by the national parties in order to determine whether, given the context of political partisanship out of which such formulas necessarily arise, substantial deviations from equality of voting power at the Conventions are supported by legitimate justifications.[38]

This conclusion was cited and found determinative of the justiciability issue in *Bode* as well.[39]

Our decisions in *Georgia* and *Bode* were not reached without considerable pondering of the Supreme Court's then current development of the "one man, one vote" doctrine. In the interim since the Court has illuminated in those cases discussed above [40] issues which are much closer and therefore much more determinative of the issues we face here. Reflecting on these most recent Supreme Court pronouncements, it is apparent that our analysis in *Georgia* and *Bode* is inconsistent therewith.

The errors of our previous position would seem to be two. First, that the "one man, one vote" principle developed in reapportionment cases can have no application to a body which is neither elective nor representative, and which does not exercise general governmental powers. Second, even assuming a possible analogy between a legislature and a political party's nominating convention, it is impossible meaningfully to define and identify the constituency each delegate purportedly represents. These twin logical failings of the *Georgia* rationale should not, we submit, be allowed to resist analysis in yet another of this Circuit's delegate apportionment decisions. They are dealt with in turn below.

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[38] *Id.* at 109, 447 F.2d at 1278.

[39] 146 U.S. App. D.C. 373, 376, 452 F.2d 1302, 1305 (1971).

[40] *Cousins* v. *Wigoda*, 419 U.S. 477 (1975); *O'Brien* v. *Brown*, 409 U.S. 1 (1972).

A. *The Non-Governmental, Non-Representative Nature of a Political Party Convention*

The Supreme Court has repeatedly emphasized, in one reapportionment case after another, that the principle of "one man, one vote" applies only to units of government which are representative in nature and exercise general governmental powers.[41] If the government unit has a very limited function and its members are not accountable to particular constituencies for their decisions, the "malapportionment" of the members does no offense to the Constitution.[42]

Political party nominating conventions meet neither of the criteria for application of the "one man, one vote" principle. In the first place, not only do they not exercise general governmental powers, but, as discussed in Part I above, they are not a unit of government at all. It may well be that the convention serves an important societal interest in winnowing out some candidates and thereby reducing the number who appear on the ballot at the general election; but the incidental performance of a public benefit by a private association does not render its activity "state action." Even assuming the possibility of ascribing a governmental function to a political convention, the analogy would be much closer to a special purpose unit which does not exercise normal governmental powers over the citizenry (and whose acts have disproportionate effects on different segments of the community) than to a legislature or other body with more generalized governmental authority.[43]

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[41] *See, e.g., Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973); *Hadley* v. *Junior College District*, 397 U.S. 50 (1970); *Avery* v. *Midland County*, 390 U.S. 474 (1968); *Sailors* v. *Board of Education*, 387 U.S. 105 (1967).

[42] *Id.*

[43] *See Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*, 410 U.S. 719, 728-29 (1973).

Second, and equally important, a political convention is not a representative body. Delegates need not be, and usually are not, elected to their positions.[44] They are not bound to vote for any candidate and do exercise their own discretion, based partially on occurrences subsequent to their selection and often on happenings at the convention itself. Even in the minority of states where delegates are elected or selected as the by-product of a Presidential primary, the delegate is only morally bound on a limited number of ballots to stick by a particular candidate. Furthermore, as *Cousins* v. *Wigoda* made clear, the convention is free to reject any individual delegate or slate of delegates—regardless of the method by which they were selected or elected—which does not meet with the convention's approval.

Thus, the delegate to a convention is not comparable to a representative in a legislature. A representative has a right to compel the legislature to seat him.[45] If he is not seated, the citizens of his state or district are effectively disenfranchised. In contrast, these same citizens enjoy no legal right to be represented at a political convention. They have no right, therefore, to insist on particular delegates, or to demand that those delegates vote in accordance with their wishes. To force a national convention involuntarily to accept delegates of a particular state's choosing would be in direct contravention of each delegate's and the party's right of free association.

To be sure, the major parties at present accept delegations from every state to their national conventions. Moreover, the delegates can be expected to make known to the convention the political views of actual and potential

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[44] *See Developments in the Law—Election Law*, 88 Harv. L. Rev. 1111, 1153-54 (1975).

[45] *See Powell* v. *McCormick*, 395 U.S. 486 (1969).

party adherents in their respective states. Indeed, the course of reform within the Democratic Party in recent years evidences the party's decision to become "more open," to encourage greater "grass roots" participation, and to make its conventions theoretically more representative of the will of its "constituency."[46] This decision by the Democrats, however, was a *political* choice, borne of what the convention perceived was in the party's political self-interest. If that decision, in the view of succeeding conventions, is determined to have injected too much divisiveness and factionalism within the party, the party is free to rescind it.

So, in the case at bar, if the Republican Party has made the political choice to invite larger delegations from the western and southern states, or from states which have traditionally voted Republican, it may be because the party believes that is the way to keep its organization in those states strong, or because it feels an obligation to reward those states for past allegiance, or because it feels delegates from those states are more likely to be of the proper ideological bent. Regardless of its reasoning, or of its sagacity, that decision is for the Republican National Convention alone to make—not for one faction within the party which was unable to persuade the convention of the merit of its position, and not for the courts.

The judiciary has neither standards by which to make the decision nor the right to make the kinds of sensitive policy determinations which are required.

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[46] *See generally* Bickel, Reform and Continuity, The Electoral College, the Convention, and the Party System (1973); Note, *Presidential Nominating Conventions: Party Rules, State Law and the Constitution*, 62 Geo. L. J. 1621, 1621-22 n. 5, 1627 nn. 30-31; *Riddell* v. *National Democratic Party*, 344 F. Supp. 908, 918, 921 (S.D. Miss. 1972).

B. *The Unidentifiable Nature of a Political Party's "Constituency"*

Even assuming the possibility of drawing an analogy between the apportionment of representatives in a legislature and the allocation of delegates to a convention, the "one man, one vote" standard is well nigh impossible to apply in this situation. That standard depends on identifying the "man" whose "vote" is to be given equal weight with that of some other man. The reapportionment decisions use population as their criterion, and, not surprisingly, in *Georgia* the delegate apportionment plan was challenged on the ground that it failed strictly to conform to the relative population of the states. We correctly rejected that argument, noting that a convention delegate, unlike an elected official, does not represent the population as a whole, but a constituency which is ". . . significantly smaller than the whole of the electorate, and varies dramatically from state to state and from election to election." [47]

Inevitably, in *Bode* we were faced with the argument that the only acceptable criterion for allocating delegates was that of party strength in a state—as demonstrated by the average of the number of votes cast for the Democratic Presidential nominee in the three immediately preceding Presidential elections. We correctly rejected that argument as well, with the following analysis:

> Nor is the individual to be represented identifiable except in a loose conceptual sense. Appellees would define such individual as one who cast an anonymous vote for the Democratic Presidential candidate in an earlier year. It seems to us that the constituency represented at a national convention does not comprise solely "Democrats," so defined. To the extent that a voter, whether he be a registered Democrat

[47] 145 U.S. App. D.C. 102, 110, 447 F.2d 1271, 1279 (1971).

> or a Republican, third party adherent or independent, is given alternative slates by the two major parties, he has a stake in the outcome of the nominating process of both parties. *Accordingly, the constituency for a national convention comprises to a certain degree the entire electorate.* By viewing the constituency of the Democratic National Convention in this way, the application of appellees' theory—that the allocation of delegates must be based on past performance—could theoretically result in a failure to represent, or at best, in an underrepresentation, of those who might wish to nominate and vote for a nominee different from the one ultimately selected at the convention. *To identify and count potential Democrats is impossible, requiring desirable but unavailable clairvoyance. Elusive too is the utilization of past voting patterns—transitory political phenomena—to ascertain the current population to be represented at a national convention.*[48] (Emphasis added.)

Added to the logical and practical bankruptcy of the "party strength" argument is the fact that in fifteen states there is no voter registration by party—a possible alternative means of determining the party's "constituency"—and in other states the lists are outdated.[49] Moreover, many voters register as "independents" in order to avoid being tagged with the label of one party or another. Finally, even registered "party members" have no duties or obligations toward the party; they may alter their membership at will. Even those who retain their membership cannot be compelled either to contribute financially to the party or display loyalty at the polls.

If neither population nor party strength can be relied upon to provide a "judicially manageable and discover-

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[48] 146 U.S. App. D.C. 373, 377-78, 452 F.2d 1302, 1306-07 (1971).

[49] Appellants' Br. at 28.

able standard" for deciding the question of delegate allocation, what possible standard remains? Certainly no combination of the two provides any more stable constitutional footing than each standing alone. Our inability to formulate a viable standard in *Georgia* or *Bode*, the refusal of the panel in the vacated opinion in the instant case to set down any clear guidelines, and the failure of the majority of this court *en banc* to identify the touchstone by which it has ratified the allocation plan challenged here, leads us to the conclusion that no authoritative standard exists. The absence of a judicially cognizable criterion for determining the "proper" allocation of delegates to a political convention dictates that the courts must refuse to intervene in disputes between intra-party factions over such allocation. The decision must be left to the internal decision-making machinery of each individual party.

*Conclusion*

The majority today sidesteps the issues of state action and justiciability at the potential cost of continued disruptive litigation over the private, political decisions of national party conventions as to their future membership. This manifests a strange intent to keep this court open for the business of directing the proceedings of national political conventions—of which there may be a surfeit in 1976—in spite of the fact that the Supreme Court has all but told us such business is none of our business.

The determination of what formula to employ in allocating delegates involves delicate questions of how best "to achieve the practical advancement of the political ideas for the pursuit of which the [party] was formed." [50] It is a question intensely personal to the party, involving

[50] *Redfearn* v. *Delaware Republican State Comm.*, 502 F.2d 1123, 1127-28 (3rd Cir. 1974).

not only the exercise of its members' constitutional right to free association, but also political, strategic, and ideological considerations which are manifestly inappropriate for the courts. We concur in the result reached by the majority, but register our strong disagreement with their decision to avoid the decisive threshold issues in this case.

BAZELON, *Chief Judge, dissenting*: I remain convinced by the arguments advanced in the majority opinion of the division that first heard this appeal.[1] The Ripon Society has provided us on rehearing with ample factual data to support the tentative conclusions in Part I of the division's opinion that the so-called "victory bonus" results in a very substantial deviation from the one-person-one-vote norm.[2] While I adhere to previously stated views, several statements in the various opinions rendered by members of this court deserve critical comment; the purpose of this dissenting opinion is to offer such comment in defense of the majority opinion of the division.

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[1] Since the division's opinion issued, one additional court has applied the one person-one-vote principle to political parties, Redfearn v. Delaware Republican State Comm., 393 F. Supp. 372 (D. Del. 1975) (reaffirming its earlier decision and rejecting the alternative of invalidating state laws which adopted party decisions). On the other hand, the intervening decision in Alyeska Pipeline Service Co. v. Wilderness Society, 95 S. Ct. 1612 (1975) would compel the denial of attorneys' fees as requested by plaintiff-appellant.

[2] In the brief on rehearing the Ripon Society has applied the 1976 Republican formula to both the 1972 and 1968-71 election results, and has calculated (1) deviations from the mean Republican vote per delegate, and (2) deviations from the mean population per delegate. For the 1972 election, its figures show the average deviation from the mean in both categories (1) and (2) to be 29.3%. For the 1968-71 elections, the average deviation in category (1) would be 36.7% and in category (2) 32.3%. These figures can usefully be compared to the average deviation from the mean population per Electoral College vote which, based on the 1970 census, is 22.2%.

More damningly, the Ripon brief shows that the uniform bonuses disserve both the goal of one Republican one vote, and the goal of one person one vote. Applied to the 1968-71 elections, the 1976 formula without uniform bonuses would produce an average deviation in category (1) of 32.1% (4.6% less than the average deviation with the uniform bonuses) and in category (2) of 25.8% (3.5% less). The Ripon brief does not isolate the effect of the proportional bonuses.

I. *Standing*

The rather incredible assertion is made that the Ripon Society may lack standing to prosecute this case. Not only has this assertion been implicitly rejected by the Supreme Court in reapportionment opinions—in ruling on the merits of claims of malapportionment brought by groups of citizens [3]—but the Court has expressly held that an organization may assert the rights of its members.[4] This court has an equally lengthy and consistent line of authority in support of the same proposition.[5] Magically this precedent is waived aside with the stated argument that no evidence is adduced to show the members of the Ripon Society are not capable of enforcing their own rights. No such inquiry is necessary or has ever been required to support the limited *jus tertii* standing of an organization in favor of its members. The issue of associational standing is far removed from the normal difficulties of *jus tertii* standing because the association *is* the class of injured parties, as in a class action. The reams and reams of administrative appeals brought by groups of citizens in support of the rights of members is further proof of the extreme oddity of the court's suggestion. There is not one whit of doctrinal support for a holding that the Ripon Society lacks standing.

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[3] *E.g.* Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964).

[4] Sierra Club v. Morton, 405 U.S. 727, 739 (1972). *See also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

[5] *See* National Automatic Laundry & Cleaning Council v. Shultz, 443 F. 2d 689, 693-94 (D.C. Cir. 1971) and cases cited. There are literally hundreds of administrative appeals largely involving communications and environmental policy in which standing for citizens' groups of behalf of their members is accepted as a matter of course. *E.g.*, Citizens Comm. to Save WEFM v. FCC, 506 F. 2d 246 (D.C. Cir. 1974); Wilderness Soc'y v. Morton, 495 F.2d 1026 (D.C. Cir. 1974), *rev'd on other grounds*, Alyeska Pipeline Service Co. v. Wilderness Soc'y, 95 S. Ct. 1612 (1975).

II. *State Action*

The logic of our holding of state action in *Georgia* and *Bode* is unimpaired by the reasoning of the various opinions in this court or recent state action opinions in the Supreme Court. There is a clear "nexus" between state action in the process of selection of delegates[6] (and in the process of adopting the narrowing function performed by the selected delegates) *and* malapportionment of the delegates: malapportionment inheres in the nature of selection and in the ultimate choice by those selected as all seem to admit. Why else would the party malapportion? Of course, there is no state or federal law which requires the malapportionment but neither was there any state law requiring racial discrimination in *Shelley v. Kraemer*, 334 U.S. 1 (1948). But in both cases the state affirmatively adopts the discrimination by otherwise "neutral" actions. And, of course, the Court

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[6] Generally state law determines how delegates to national conventions are to be selected; when selection must occur; who is eligible to run for delegate; and who is eligible to vote. State law also fixes the obligations of delegates once selected. Delegate selection and Presidential preference primaries are state funded and state-run. And the nominees chosen by the delegates to major party conventions are universally afforded automatic ballot access. *See generally* CONGRESSIONAL RESEARCH SERVICE, NOMINATION AND ELECTION OF THE PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES 72-173 (1972); *Developments in the Law—Elections*, 88 Harv. L. Rev. 1111, 1121, 1151-1217 (1975).

The minority on rehearing makes the startling assertion that it does not follow from the fact that state selection of delegates constitutes state action that the actions of the delegates so selected in the national convention constitute state action. This heroic concept would mean that organizations such as the New York port authority are not state action since they are not an organization of any local government and since the "mere fact" that they are formed by two constituent state governments is not sufficient to find state action. This absurdity was decisively rejected in Howard University v. National Collegiate Athletic Association, 510 F. 2d 213 (D.C. Cir. 1975) and authorities cited.

in *Jackson* explicitly cited previous holdings of state action in regard to party primaries as independent and distinct from its holding in regard to public utilities.[7]

The baffling suggestion is advanced that *Cousins v. Wigoda*, 419 U.S. 477 (1975) somehow bears on this issue. But *Cousins* holds only that a state may not interfere with the associational rights of national political parties, not that a state is prohibited from assisting such parties in the selection of delegates or adopt the party's performance of a narrowing function. In fact, the Court has recently held that a state has a compelling state interest in *enforcing* this narrowing process.[8] Furthermore, all this says nothing about the power of the federal government to regulate political parties, an issue left expressly open in *Cousins*. Feeble indeed is the argument that the state must have plenary power over an organization, no matter how much the state adopts the organization's functions, in order for the organization to constitute state action. *Compare Reitman v. Mulkey*, 387 U.S. 369 (1967).

Nor may previous Supreme Court findings of state action be distinguished as involving racial discrimination for which a lesser quantity of state action is required. First, none of the cases expressly relied on this fact. Second, the Supreme Court refused to make the racial discrimination distinction in *Moose Lodge* and relied on the *Moose Lodge* "nexus" argument as the primary ground for decision in *Jackson*. Third, these cases were as much "right to vote" cases as they were racial discrimination cases and as such formed part of the ex-

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[7] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974). The minority offers the suggestion that state action is not present merely because the state somehow "benefits" a private organization, a comment which is uncontroversial enough. Its relevance to the issue at hand however, is questionable.

[8] Storer v. Brown, 415 U.S. 724 (1974).

press doctrinal basis for *Reynolds v. Sims*, 377 U.S. 533 (1964). The subject matter of *Reynolds* and the present litigation is territorial discrimination against the right to vote of certain citizens. *Reynolds* teaches that such discrimination is forbidden by the same constitutional structure that forbids racial discrimination against the right to vote of certain citizens.[9]

III. *Justiciability*

The majority opinion of the division, following *Georgia* and *Bode*, held that *Baker v. Carr*, 369 U.S. 186 (1962) resolved the justiciability issue as a threshold matter and that further consideration of policies of justiciability must be integrated into a determination of the merits of the plaintiffs' claim. The majority on rehearing appears to adopt this approach. However some members of the court suggest this analysis is mistaken both because the one-person-one-vote rule is not applicable to political parties (and hence cannot be a judicially manageable standard as it was in *Baker*) and because the constituency of a national political party cannot be judicially defined. Neither argument withstands analysis.

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[9] The minority on rehearing attempt to defuse the fairly obvious state action rationale presented by federal financing of most major party activities on the national level by referencing recent decisions holding that "mere receipt" of state funds does not constitute state action. But here we have more than that—we have complete and *exclusive* federal financing of the convention and partially exclusive financing of the contested elections of delegates (the matching funds system for presidential elections and a concommitant spending limit). It certainly stretches the imagination to declare that this sort of funding is analogous to federal and state grants to private universities. To return to the example of the New York port authority, the minority would hold that there is no state action "merely" because the states of New York and New Jersey finance the operation of the entity through fare setting arrangements. Such a potential holding does not commend itself to us.

First, the minority is simply wrong in asserting that a national political convention is a "nongovernmental" body to which the one-person-one-vote rule is not applicable. *Gray v. Sanders*, 372 U.S. 368 (1963)—involving a party primary—and *Moore v. Ogilvie*, 394 U.S. 814 (1969)—involving malapportionment of the *signature requirements* on nominating petitions—are conclusive authority that the one-person-one-vote principle applies to the nominating activities of political parties. Indeed, it would boggle the mind to hold that the Kansas City Junior College District performed "governmental" functions while the national convention of a major political party does not.[10] Prevailing doctrine does not require such an absurdity.

As the division majority clearly holds,[11] the proper definition of a party's constituency is nonjusticiable. What is justiciable is the following: once a party defines a constituency for itself, courts will require that the party not malapportion the members of that constituency so as to deprive some constituents of their right to vote.[12]

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[10] *See* Hadley v. Junior College Dist., 397 U.S. 50 (1970).

[11] Majority opinion at 31 n. 47, 37 n. 58.

[12] The minority on rehearing fails to distinguish between the two lines of "right to vote" cases, one line represented by Reynolds v. Sims and the other by Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969). *Kramer* concerns constitutional limits on the definition of a constituency for a particular governmental entity; *Reynolds* largely concerns what follows after a definition of constituency is reached *i.e.* may the constituency be malapportioned. Salyer v. Tular Lake Basin Water Storage Dist., 410 U.S. 719 (1973) was a holding based on the *Kramer* principles and only very tangentially on the *Reynolds* principles. Of course, the two principles are closely interwoven and it may be unprofitable to distinguish them in any other context than national conventions of major parties. But the point of the distinction is important: it does not follow from the fact that a constituency of a state organization does not encompass all eligible or registered voters that malapportionment of the constituency that does exist is constitutionally appropriate.

IV. *The Merits*

The approach of the majority on rehearing to the merits of the case is to "balance" the one-person-one-vote principle against the legitimate interests of national political parties, interests which are entitled to First Amendment recognition if not unqualified acceptance.[13] The method itself is not necessarily objectionable, but the reasoning by which the one-person-one-vote principle is trivialized and by which interests of the party are extended beyond their appropriate sphere surely is contrary to precedent.

The majority's central argument is that the national parties are so undemocratic already that enforcement of the right to an equal vote for all party constituents makes little sense. Why is not an opposite conclusion equally plausible and indeed convincing? The structure of state legislatures and for that matter the Congress may well be undemocratic in particulars, for example the committee structure, the caucus, the system of patronage distribution. But surely it does not follow that malapportionment of legislative districts is thereby sanctioned. The whole purpose of reapportionment is to give all voters an equal place at the democratic starting line. What thereafter occurs is but the natural workings of the democratic process in which temporary majorities make necessary political decisions. The whole drift of reapportionment—the one-person-one-vote prin-

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[13] *See* the discussion on pages 14-15, 35-36 of the majority opinion of the division. The court in its discussion of the First Amendment interests of the party apparently fails to recall that it is assuming for purposes of decision that the convention is state action. While this fact does not eliminate First Amendment concerns, as the majority opinion of the division clearly holds, it does place consideration of those claims in a vastly different light—instead of the rights of the association being paramount, the rights of the members of the association become paramount and if distinct from the interests of the association, should prevail.

ciple—is to prevent these temporary majorities from entrenching themselves in a manner that prevents the natural working of the democratic process *in the future.* Reapportionment derives its immense constitutional legitimacy from its prevention of this entrenchment.

This is the main error of the court's way: it assumes that decisions of a temporary majority in the organization of the party and the use of the party's political power are no different from entrenchment of the temporary majority in the vary process of political choice. The court then leaps to the improbable conclusion that malapportionment of political parties either does not violate the one-person-one-vote principle or is outside the one-person-one-vote principle. But as is argued as persuasively as I know how in the majority opinion for the division,[14] an equal position at the democratic starting line preventing entrenchment of temporary majorities is distinct from the necessary actions of temporary majorities resulting from the operation of the political process. Moreover, equality at the starting line is just as important, if not more important, in the convention context than in the general election context, since for the great mass of voters their choice has already been determined by the convention's decision.[15]

The justifications, if they may be so named, the court offers in support of the malapportionment of the Republican convention are the sort easily made and quickly

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[14] *See* slip op. at 23-30, —— F. 2d at —— *supra.*

[15] The majority on rehearing asserts that *Bode,* by accepting the electoral college as a deviation from strict one-person-one vote standards, is a tacit admission that the one-person-one vote is either not applicable or applicable in only a meaningless pale version. This assertion is contradicted by the express holding in Wesberry v. Sanders, 374 U.S. 1 (1964) that the constitutional requirement of one representative from each state in the House—creating a malapportionment of sorts—does not justify any further malapportionment.

forgotten. The justifications are adequately disposed of in the division opinion.[16] It is enough to add here that the party itself seems to admit quite openly that the purpose of the victory bonus and its consequent malapportionment is not, as the majority on rehearing would have it, as some sort of "reward" or as a measure of "probable success" in capturing a state's electoral college votes. Rather, the purpose is an ideological compromise designed to apportion power within the party by means of a territorial discrimination. The "reward" and "prediction of future success" rationales are completely subsidiary to this overriding purpose. This should be obvious at least from the fact that these rationales simply cannot explain the "uniform" victory bonus and do not convincingly explain the failure to include the results of more than one presidential election in determining the need for a reward or the probability of future success.

Generally the court seems to assume that if a malapportionment might be helpful in winning elections or aid in the organization or solidarity of the party, it is permissible. But this reasoning destroys the one-person-one-vote principle. All malapportionment may have some legitimate objective—in winning elections or in ensuring party national solidarity. The one-person-one-vote principle does not deny the existence of these legitimate objectives, but holds that stretching them to permit *malapportionment* undercuts the legitimacy of a democratic political order and hence is an overbroad application of a legitimate state aim. The court by denying this result here is simply holding that the one-person-one-vote principle is not applicable to political parties, without directly arguing the point, under the guise of "balancing."[17] This is true, since there is no malapportionment

[16] *See* slip op. at 30-37, —— F.2d at —— *supra.*

[17] On this "balancing" of the party's First Amendment interests and of the one-person-one-vote principle, *see* note 13 *supra.*

conceivable, including overt racial discrimination, which could not be justified on similar grounds.

Of course, the court intimates it would not tolerate overt racial discrimination (although it approves here a territorial discrimination which has largely the same effect). But why? Surely in some areas it would be rational indeed, unfortunately so, to exclude blacks or other minorities to ensure party victory or solidarity. If the court were to reach a different result in such a case, then it will be pure *ipse dixit*. And, after all, *Reynolds v. Sims* expressly extended the proscription of denial of the right to vote on the basis of racial discrimination to proscription of denial based on territorial discrimination.

Stripped of its rational exterior, I read the majority opinion on rehearing as telling us something of this sort:

> The reapportionment decisions were intensely controversial and involved a radical extension of judicial power. We will not extend those decisions nor the philosophy of judicial power they embody even if logically compelled, absent either more public demand than we can perceive or clear guidance from the Supreme Court. We simply do not believe the principle of one-person-one-vote is sufficiently important to overcome these concerns of institutional competence and popular approval, which have always lain on the horizon of the reapportionment decisions and which counsel studied conservation of the power of judicial review.

This sort of judicial statesmanship is not so much wrong as insensitive to the principles of legitimacy that underlie a democratic state and to the horrendous anomalies that this decision produces—*e.g.*, that the Kansas City junior college district must be properly apportioned while the national convention of a major political party is not.

The principle of legitimacy is this, repeated again and again in support of controversial but necessary public decisions: if you disagree with present public policy, run for office or vote to throw the rascals out. Go through the legitimate processes of democratic government—the "system"—and popular change will follow. But the court tells us this is naive ideology, fit for high school textbooks perhaps, but surely not as a constitutional command in the "real world." There "democracy" means the power of incumbency and the power obtained by controlling the process of political choice. Democracy, in short, means only what the politicians say it means. I do not believe that the Constitution harbors any such cynical view.[18]

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[18] Perhaps the ultimate irony of the court's opinion is that it renders largely meaningless much of what we recently said in Buckley v. Valeo, No. 75-1061 (Aug. 15, 1975). In Buckley this court, again sitting en banc, upheld the major provisions of the Federal Election Campaign Act of 1971, as amended by the Federal Election Campaign Act Amendments of 1974. The lynchpin of that decision, in my view, was our recognition of the compelling governmental interest in equalizing the influence of all voters. As we stated:

> It would be strange indeed if, by extrapolation outward from the basic rights of individuals, the wealthy few could claim a constitutional guarantee to a stronger political voice than the unwealthy many because they are able to give and spend more money, and because the amounts they give and spend cannot be limited.

Slip Op. at 1517. I find it equally strange that the court now finds that the right to associate freely enables the powerful few to claim a stronger voice than the unpowerful many. I cannot understand why an interest which only yesterday we termed compelling is today afforded so little weight in the scheme of constitutional values.

DANAHER, *Senior Circuit Judge*, dissenting:

Perhaps the exercise of greater caution would forfend against my expressing any disagreement from what has been said by our respected colleague, Judge McGowan. He has written so well and has said so much with which I am in accord that, possibly, I should suppress comment. Were I convinced that properly we could here reach the merits, I would concur in his ultimate conclusions.

It is my judgment that we may not—and therefore that we should not—reach the merits. I am persuaded that jurisdiction is wanting in that: 1, the respective Ripon plaintiffs lacked standing to initiate this action; and 2, the issue submitted on this record is nonjusticable. I thus join substantially [1] in the respective discussions tendered by my colleagues, Judges Tamm and Wilkey.

## INTRODUCTION

Let me turn immediately to an important aspect of the business before us. Involved is the Republican Party's plan, embodied in its Rule 30, for the *allocation* to its 1976 Convention of delegates from the various States, the Territories and the District of Columbia. There is a real distinction between the Republican Party's allocation program and the "state" problems involved in "apportionment" cases treating of legislative reapportionment plans or dealing with Congressional redistricting

[1] For example, I see no need for us to overrule this court's earlier opinions in Georgia v. National Democratic Party, 145 U.S.App. D.C. 102, 447 F.2d 1271, *cert. denied*, 404 U.S. 858 (1971); and in Bode v. National Democratic Party, 146 U.S.App.D.C. 373, 452 F.2d 1302 (1971), *cert. denied*, 404 U.S. 1019 (1972). Different treatment undoubtedly would have been developed if there then had been available the Court's discussion in O'Brien v. Brown, 409 U.S. 1 (1972), Cousins v. Wigoda, 419 U.S. 477 (1975) and the Memorandum Opinion by Rehnquist, J., in Republican Committee v. Ripon Society, 409 U.S. 1222 (1972).

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issues and similar situations which, from time to time, have engaged the attention of the Court.[2]

The Ripon plaintiffs, in their allegations of record here, repeatedly have spoken of the "apportionment of delegates." In their motion before the Supreme Court they had alleged in their paragraph 3:

> The stay of the injunctive portion of the District Court's order is wholly inconsistent with the procedure approved by this Court for the granting of relief in *reapportionment cases* (emphasis added) cited and followed by the District Court. *See* especially *Reynolds* v. *Sims*, 377 U.S. 533, 584-586 (1964).

(Ripon plaintiffs' motion, Supreme Court file, dated August 17, (1972).

Justice Rehnquist did not miss the point, however, for he specifically wrote in *Republican Committee v. Ripon Society*, *supra* note 1, at 1225:

> In the case at bar, of course, we deal with a *delegate-allocation dispute* that retains importance until 1976 *rather than a credentials dispute* such as was involved in *O'Brien v. Brown* [409 U.S. 1 (1972)]. (Emphasis added.)[3]

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[2] Gaffney v. Cummings, 412 U.S. 735 (1973); White v. Weiser, 412 U.S. 783 (1973); Mahan v. Howell, 410 U.S. 315 (1973); Wesberry v. Sanders, 376 U.S. 1 (1964); and Baker v. Carr, 369 U.S. 186 (1962), each of which, among many others, demonstrably involved "state" action. We are not here talking about a "right to vote" as in *election* situations, *e.g.*, United States v. Classic, 313 U.S. 299, 318 (1941), or Williams v. Rhodes, 393 U.S. 23 (1968), after constitutional prerogatives had been denied.

[3] Mr. Justice Blackmun further particularized in Chapman v. Meier, 420 U.S. 1, 3 (1975):

> This case presents the issue of the constitutionality of a federal-court-ordered *apportionment* of the North Dakota Legislature. That State, like many others, has struggled to satisfy constitutional requirements for *legislative apportionment*

I

It must be remembered that nothing in the Constitution refers to national party conventions. Congress has passed no statute giving *access to the courts* in respect of the allocation of delegate strength to a national party convention, and Congress certainly knows how to do just that, were Congress so to decide. Contrast the instant situation with the provisions of the Federal Election Campaign Act, as amended, where the codified 2 U.S.C. § 437h(a) provides:

> The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act . . . .[4]

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delineated in *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964) * * * and other cases.

The Ripon plaintiffs simply fail to distinguish the "apportionment" problems arising under state law from action by the Republican Party Convention. In Gray v. Sanders, 372 U.S. 368, 378, note 10, (1963) the Court expressly specified:

> We do not reach here the questions that would be presented were the convention system used for nominating candidates in lieu of the primary system.

Even in Reynolds v. Sims, text *supra*, 377 U.S. at 565, the Court itself explained that a citizen "has an inalienable right to full and effective participation in the political processes of his State's *legislative bodies*," and further, that "Full and effective participation by all citizens in *state* government requires, therefore, that each citizen have an equally effective voice in the *election* of members of his *state legislature*." (Emphasis added.)

[4] *See* Powell, J., concurring in United States v. Richardson, 418 U.S. at 194: ". . . the Court has not broken with the traditional requirement that, *in the absence of a specific statutory grant* of the right of review, a plaintiff must allege some particularized injury that sets him apart from the man on the street." (Emphasis added.) *See also, id.*, notes 15 and 16.

This court recently considered the import of this language in *Buckley v. Valeo*, —— U.S.App.D.C. ——, ——, —— F.2d ——, —— (slip op. 1527-1528, August 15, 1975) (*en banc*) where it was pointed out that the section

> does not entitle the eligible plaintiffs to raise any conceivable constitutional issue with respect to the Act and relevant criminal sections, no matter how remote or speculative. We perceive no congressional intent to waive article III's requirement that there be a present "case or controversy." The declaratory judgment, often seen as the outer limits of article III jurisdiction, nevertheless requires that there be an actual controversy. (Footnotes omitted.)

It is not in any way to disparage the purposes of Ripon Society, Inc. that we say, flatly, the corporation totally lacks standing to sue. Surely it is entitled to no relief on its own account; obviously it has no vote. The Supreme Court has told us in *Sierra Club v. Morton*, 405 U.S. 727 (1972),

> a mere "interest in a problem," no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved" within the meaning of the APA. *Id.*, at 739.

*And see United States v. Richardson*, 418 U.S. 166, 177-180 (1974).

The individual Ripon plaintiffs here stand on no higher plane. They allege no specific injury pertinent to themselves. No statute has authorized the institution of this action by them. There has been no denial of a right in any of the individual plaintiffs to a seat in the Republican Convention. Indeed a national party convention is under no obligation to receive any of these

Ripon plaintiffs as a delegate, as *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975) makes clear.

The alleged ground of aggrievement is a mere abstraction.[5] These individual Ripon plaintiffs have afforded no predicate for action by the courts. They are in no different position on any account than is any member of the public.[6] It would seem inevitable that their action should be barred. They lack standing within the test laid down in *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 220-221 (1974) where the Court said

> Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. It adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful. This personal stake is what the Court has consistently held enables a complainant authoritatively to present to a court a complete perspective upon the ad-

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[5] While not controlling here, to be sure, even in an "apportionment" setting, Mr. Justice Frankfurter undertook his own definition of what he deemed to be an abstract claim. The term applies here in light of our record. Even respecting a state apportionment issue, Mr. Justice Frankfurter put it thus:

> . . . The claim is hypothetical and the assumptions are abstract because the Court does not vouchsafe the lower courts—state and federal—guidelines for formulating specific, definite, wholly unprecedented remedies for the inevitable litigations that today's umbrageous disposition is bound to stimulate in connection with politically motivated reapportionments in so many States. In such a setting, to promulgate jurisdiction in the abstract is meaningless. It is as devoid of reality as "a brooding omnipresence in the sky," for it conveys no intimation what relief, if any, a District Court is capable of affording that would not invite legislatures to play ducks and drakes with the judiciary. Baker v. Carr, 369 U.S. 186, 267-268 (1962).

[6] *Cf.* Massachusetts v. Mellon, 262 U.S. 447, 487 (1923).

verse consequences flowing from the specific set of facts undergirding his grievance. Such authoritative presentations are an integral part of the judicial process, for a court must rely on the parties' treatment of the facts and claims before it to develop its rules of law. [Fn. omitted.] Only concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions.

II

Even were we to assume, contrary to what has been said in Part I, *supra*, that these Ripon plaintiffs have standing, we are nonetheless bound to order that their complaint be dismissed. The issue they have tendered, in my view, is simply nonjusticiable.[7]

There is much more involved in a party's national convention than its merely nominating candidates for the presidency and vice presidency. That convention, (perhaps *most* importantly, at least on occasion), will be called upon to set forth the aims and political objectives of the political party and its adherents.[8]

To succeed in an election, the presidential nominee in a nation as populous and with interests as diverse as ours must carry the states whose electoral votes cumulatively will provide the victory which he seeks and

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[7] I will not repetitively cover ground which has been so well treated by my colleagues, Judges Tamm and Wilkey. I find myself in substantial accord with their views. I feel, however, that certain aspects of our problem may further be analyzed.

[8] Freedom to associate with others for the common advancement of political beliefs and ideas clearly is protected activity. Cousins v. Wigoda, 419 U.S. 477, 487 (1975). Three concurring justices saw the right of members of a political party to gather in a national political convention to be at the very heart of the freedom of assembly and association, *id.* at 491. Powell, J., observed, *id.* at 497, that "the National Convention of the Party may seat whomever it pleases, . . .".

which the party adherents desire. But that is not all. That presidential nominee, in addition to promoting his own candidacy, will be expected by the party and its adherents to contribute to the election of United States Senators and members of the House who will be expected to assist in the accomplishment of the party's program. Long before the national convention, on the hustings, via televised appeals, in local debates, through published statements and otherwise, party candidates for national office as well as for both branches of the Congress and for gubernatorial recognition will have sought to arouse the electorate and to recruit party adherents. The allocation of delegates will thus serve a twofold purpose.

Organization of public thought and the rallying of voters behind the presidential nominee and his program will become essential not only in an appeal to party members but to independent voters and even to members of an opposition party.[9] It is a fundamental truism that any party must seek to maximize voting support from its already registered voters. Appeal to local constituencies often enough can be marshalled through leadership already there recognized because of qualities long since made evident.

Recognition of such individuals in delegate allocation may not only add strength to the management of the convention, but additionally will tend to enhance the possibilities of garnering the electoral vote state by state, and cumulatively thus result in election of the presidential nominee. The candidate and the party adherents who can bring about that result will achieve the very purpose for which associational significance is recognized

[9] Consider results in the 1972 presidential election when the Republican candidate carried Louisiana where 97 per cent of the registered voters were Democrats! Disillusionment with a candidate and his announced program can be an intangible factor.

and protected. Not to be forgotten is the fact that the electoral vote of a particular state may turn upon a mere plurality, no matter how small, of that state's voters. Allocation of delegates to *such* states—and the selection and seating [10] of *such delegates* as can advance "the cause"—will seldom be out of mind among party leaders of either major party. The ultimate popular will, of course, ascertained at the election itself, reflects the collective mind of the American voter, and success or repudiation of the candidate, or the party will follow.[11]

Taking account of what a party may seek to do and what its adherents think it should do to accomplish the party's objectives, may we not wonder what steps are open to a court to manage the party's convention composition in delegate allocation or otherwise? Success is what the party seeks, of course. In light of what we have been saying, and having over a period of some three decades gained no more than a minority status, the Republican Party in 1972 had adopted rules and a program designed, it was thought, to improve its status and to achieve that success.[12] It is clear from

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[10] A convention, after all, may refuse to seat delegates deemed hostile to a party's potential candidate and disruptive of the party's objectives or likely to diffuse support among the voters. Cousins v. Wigoda, *supra*, 419 U.S. at 488, *and see* Mr. Justice Powell remarking at 497 that "the National Convention of the Party may seat whomever it pleases . . ."; conversely, delegates who deem themselves and their views repelled by an inhospitable convention may even "take a walk" from their own party as the Republicans found out in 1912.

[11] Most of us need not even "look at the record" to recall the two "disaster" years for the presidential nominees, respectively, the Republican in 1964, and the Democratic, in 1972.

[12] Our record is replete with evidence of the Party's approach. In support of its motion for summary judgment, there appears the Party's "Statement of Material Facts," J.A. 187. Additionally at J.A. 193 is supplied the history of delegate allocations in each presi-

the record before us, note 12 *supra*, that views largely shared by the Ripon plaintiffs were presented at length during the 1972 convention and finally were rejected by a vote of nine hundred ten to four hundred thirty-four. Losers at the convention, claiming a denial of equal protection, the Ripon plaintiffs moved to the courts, and here we are.[13]

Justiciability of state ordered and state regulated proceedings in this area afford us no guidance in the present context. Were Congress to have acted and to have regulated the composition of the national convention of a major political party, we would have before

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dential year, commencing with the year 1900 through 1972. Various evidentiary materials include the affidavit of Tom Stagg, J.A. 203, with its detailed explanation of the Party's new Rule 30; the affidavit of William C. Cramer at J.A. 210, supplemented by that of Governor Reagan at J.A. 233, that of Senator Tower at J.A. 237 and that of Gerald R. Ford, Minority Leader of the House, at J.A. 251. Exhibits and statistical tables complete the data, culminating with the affidavit of the Chairman of the Republican National Committee, Senator Robert Dole, J.A. 274, describing the efforts of the Party to achieve a consensus respecting a system of allocation of delegates.

[13] Even if the courts were somehow to fashion an allocation of delegates, there can be no control over how those delegates will vote. Many will have come to the convention committed to "favorite sons" or even to have been hostile to the nomination of the candidate ultimately to be selected. Realignment of delegates' votes may follow after consultations among delegations from the different states. Coalitions can eventuate and turn out to be powerful enough to carry the day. In such circumstances, it may seem difficult to ascertain whose vote is being "diluted"!

In Convention Decisions and Voting Records, 2d edition 1973, R. Bain and Parris, it is reported that in the 1972 Republican Convention, after a first ballot, 595 votes had been cast in favor of the nomination of General Eisenhower when 604 votes were necessary for decision. The chairman of the Alabama delegation yielded to the State of Minnesota, the chairman of which delegation thereupon cast 19 votes for General Eisenhower. Nomination was thus achieved.

us a totally different problem.[14] It may be supposed that few jurists have been more perceptive than the late Mr. Justice Jackson whose views so often have benefited so many of us. He was speaking in a quite different context, to be sure, when he dissented in *Ray v. Blair*, 343 U.S. 214, 234 (1952). Even so, we may well give thought to what he wrote:

> The demise of the whole electoral system would not impress me as a disaster. At its best it is a mystifying and distorting factor in presidential elections which may resolve a popular defeat into an electoral victory. At its worst it is open to local corruption and manipulation, once so flagrant as to threaten the stability of the country. To abolish it and substitute direct election of the President, so that every vote wherever cast would have equal weight in calculating the result, would seem to me a gain for simplicity and integrity of our governmental processes.

After the order had been entered that this case be set for hearing en banc, we invited the Democratic National Committee as *amicus* to submit a brief and to argue. We directed attention to certain specific points including those of standing and justiciability. Recognizing that there are issues involved in this litgation which bear upon the "traditional" role of political parties and the "traditional" nature of the political process, Amicus told us on brief "the Democratic Party has a vital interest in the actions taken by this court and welcomes the opportunity to present its views." [15]

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[14] But Congress has never done so; *and see* footnote 3, *supra*.

[15] We can readily recognize that "vital interest." Consider, *e.g.*, that the Democratic National Committee has adopted its rules for the allocation of delegates to the 1976 Democratic National Convention. The Party's promulgated table shows that there are to be 3,006 delegates authorized for the 1976 convention. The ten largest states including the nation's largest cities have been accorded

Amicus continues that the decision of the district court in accepting jurisdiction and in holding the claim asserted by Appellants to be justiciable, represents a departure from the historical reluctance of courts to intrude in the political process, in the absence of racial discrimination or clear state action. It is the view of the Democratic National Committee that such a departure is both unwarranted and unwise. Because of the well-established First Amendment rights of political parties and their adherents, and the clear lack of judicially manageable standards involved in any question of delegate allocation, this court should adopt the view expressed in *Irish* v. *Democratic-Farmer-Labor Party*, 287 F.Supp. 797 (D. Minn. 1968), *aff'd*, 399 F.2d 119 (8th Cir. 1968). The court in *Irish* refused to intervene in a delegate allocation matter, and expressed the view that the political process is best served by the compromise and consensus institutionalized in the political parties.

Asserting the position of the Democratic National Committee, Amicus cogently has argued that questions involving the allocation of delegates at a national convention will reflect policies which are subject to change and development, in part, at least, because of changes in a party's constituency. Associational prerogatives include retention of flexibility in a party's shaping its own organization.

One may conclude that one party may seek its strength in a certain area where dependence upon a liberal and

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1,608 delegates. From those states, clearly enough, and reflecting past exeprience as to the sources of its voting strength, the Democratic Party has allocated those delegates thus:

| | | | |
|---|---|---|---|
| California | 279 | Ohio | 152 |
| New York | 274 | Texas | 130 |
| Pennsylvania | 178 | New Jersey | 108 |
| Illinois | 169 | Massachusetts | 104 |
| Michigan | 133 | Florida | 81 |

*See* The Washington Post, March 13, 1975, "Delegate Plan Outlined by Democrats."

urbanized appeal can be expected, especially in light of past performance, to yield the greater effectiveness. The party very properly may oppose judicial intervention in the political process where in addition to the business of nominating candidates, "vital" rights of association guaranteed by the Constitution are also involved, *Cousins v. Wigoda*, *supra*, 419 U.S. at 487.[16] It would seem to follow that a party, be it Democratic or Republican, is clearly in position to limit access to the decision-making processes of the party in order best to promote the interests of the party's adherents. Just who they may be can not accurately be determined even by the party itself, and it would seem, all the more clearly, that the problem is nonjusticiable because of the inability of the courts to define the party's constituency.

I have said enough to predicate my conclusion that the issue here is nonjusticiable.[17] On that ground, I would reverse the judgment of the District Court and order that the Ripon plaintiffs' complaint be dismissed. Even correctly to decide on the merits that the present Republican delegate-allocation formula is impervious to successful challenge will conclude only this case. I think, absent racial or other invidious discrimination of constitutional dimension, that we should dispose of the instant type of challenge, once and for all.

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[16] *And see* O'Brien v. Brown, 409 U.S. 1, 4, 5 (1972).

[17] In Baker v. Carr, *supra*, 369 U.S. at 217, the Court summarized factors to be considered in a determination of nonjusticiability. Merely to hold that Republican Rule 30 violates no rights of the Ripon plaintiffs would seem not to preclude yet other challenges by other groups, irrespective of which of the major parties may be involved. *See* note 15, *supra*, where delegates from ten States will constitute more than a convention majority to the exclusion of the delegate strength of the other forty States.

A holding of nonjusticiability, on the other hand, would speak to all and make clear that a delegate-allocation plan, rationally evolved, and reflecting valid and constitutionally protected political objectives is beyond judicial modification. *Cf.*, Frankfurter, J., dissenting, Baker v. Carr, *supra*, 369 U.S. at 289.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 74-1337

THE RIPON SOCIETY, INC., ET AL.,
*Appellants*

v.

NATIONAL REPUBLICAN PARTY, ET AL.

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No. 74-1358

THE RIPON SOCIETY, INC., ET AL.,

v.

NATIONAL REPUBLICAN PARTY, ET AL.,
*Appellants*

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Appeals from the United States District Court
for the District of Columbia

(Civil 2238-71)

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Before: Bazelon, Chief Judge, Danaher, Senior Circuit Judge, Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges sitting *en banc*

JUDGMENT

These causes came on to be reheard by the Court sitting *en banc* and were reargued by counsel. On consideration of the foregoing, and in accordance with the opinion of this Court filed herein this date, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from in these

causes is hereby reversed and these cases are hereby remanded to the District Court with directions to dismiss the complaint.

Per Curiam
For the Court

/s/ Hugh E. Kline
Hugh E. Kline
Clerk

Date: September 30, 1975

Opinion for the Court filed by Circuit Judge McGowan.

Opinion filed by Circuit Judge MacKinnon, concurring except with respect to the standing of Ripon Society.

Opinion filed by Circuit Judge Tamm, with whom Circuit Judge Robb joins, concurring in the result.

Opinion filed by Circuit Judge Wilkey, concurring in result only.

Dissenting opinion filed by Chief Judge Bazelon.

Dissenting opinion filed by Senior Circuit Judge Danaher.

# CONSTITUTIONAL PROVISIONS

## ARTICLE II

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

## AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATUTORY PROVISIONS

### 28 U.S.C. § 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

### 28 U.S.C. § 1343

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

### 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges,

or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1985

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen

who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1988

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

## EXHIBIT A

Apportionment under the 1976 Formula based on 1972 election results

| | 1972 Electoral College Vote | At Large | Three per House Seat | Presidential Bonus: 4.5 | Presidential Bonus: 60% | Other Bonus: Sen. | Other Bonus: Gov. | Other Bonus: H.R. | Total |
|---|---|---|---|---|---|---|---|---|---|
| Northeast | | | | | | | | | |
| Me. | 4 | 6 | 6 | 4.5 | 2.4 | — | — | 1 | 20 |
| N.H. | 4 | 6 | 6 | 4.5 | 2.4 | — | 1 | 1 | 21 |
| Vt. | 3 | 6 | 3 | 4.5 | 1.8 | — | — | 1 | 17 |
| Mass. | 14 | 6 | 36 | — | — | 1 | — | — | 43 |
| R.I. | 4 | 6 | 6 | 4.5 | 2.4 | — | — | — | 19 |
| Conn. | 8 | 6 | 18 | 4.5 | 4.8 | — | — | 1 | 35 |
| N.Y. | 41 | 6 | 117 | 4.5 | 24.6 | — | — | 1 | 154 |
| N.J. | 17 | 6 | 45 | 4.5 | 10.2 | 1 | — | — | 67 |
| Del. | 3 | 6 | 3 | 4.5 | 1.8 | — | — | 1 | 17 |
| Md. | 10 | 6 | 24 | 4.5 | 6.0 | — | — | 1 | 42 |
| Pa. | 27 | 6 | 75 | 4.5 | 16.2 | — | — | — | 102 |
| W. Va. | 6 | 6 | 12 | 4.5 | 3.6 | — | 1 | — | 28 |
| | 141 | 72 | 351 | 55 | 76 | 2 | 2 | 7 | 565 |

## EXHIBIT A—Continued

| | 1972 Electoral College Vote | At Large | Three per House Seat | Presidential Bonus: 4.5 | Presidential Bonus: 60% | Other Bonus: Sen. | Other Bonus: Gov. | Other Bonus: H.R. | Total |
|---|---|---|---|---|---|---|---|---|---|
| Middle West | | | | | | | | | |
| Ohio | 25 | 6 | 69 | 4.5 | 15.0 | — | — | 1 | 96 |
| Mich. | 21 | 6 | 57 | 4.5 | 12.6 | 1 | — | 1 | 83 |
| Ind. | 13 | 6 | 33 | 4.5 | 7.8 | — | 1 | 1 | 54 |
| Ill. | 26 | 6 | 72 | 4.5 | 15.6 | 1 | — | 1 | 101 |
| Wis. | 11 | 6 | 27 | 4.5 | 6.6 | — | — | — | 45 |
| Minn. | 10 | 6 | 24 | 4.5 | 6.0 | — | — | 1 | 42 |
| Iowa | 8 | 6 | 18 | 4.5 | 4.8 | — | 1 | 1 | 36 |
| Mo. | 12 | 6 | 30 | 4.5 | 7.2 | — | 1 | — | 49 |
| N. Dak. | 3 | 6 | 3 | 4.5 | 1.8 | — | — | 1 | 17 |
| S. Dak. | 4 | 6 | 6 | 4.5 | 2.4 | — | — | 1 | 20 |
| Nebr. | 5 | 6 | 9 | 4.5 | 3.0 | 1 | — | 1 | 25 |
| Kansas | 7 | 6 | 15 | 4.5 | 4.2 | 1 | — | 1 | 32 |
| | 145 | 72 | 363 | 60 | 88 | 4 | 3 | 10 | 600 |
| South | | | | | | | | | |
| Va. | 12 | 6 | 30 | 4.5 | 7.2 | 1 | — | 1 | 50 |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| N.C. | 13 | 6 | 33 | 4.5 | 7.8 | 1 | 1 | — | 54 |
| S.C. | 8 | 6 | 18 | 4.5 | 4.8 | 1 | — | — | 35 |
| Ga. | 12 | 6 | 30 | 4.5 | 7.2 | — | — | — | 48 |
| Fla. | 17 | 6 | 45 | 4.5 | 10.2 | — | — | — | 66 |
| Ky. | 9 | 6 | 21 | 4.5 | 5.4 | — | — | — | 37 |
| Tenn. | 10 | 6 | 24 | 4.5 | 6.0 | 1 | — | 1 | 43 |
| Ala. | 9 | 6 | 21 | 4.5 | 5.4 | — | — | — | 37 |
| Miss. | 7 | 6 | 15 | 4.5 | 4.2 | — | — | — | 30 |
| Ark. | 6 | 6 | 12 | 4.5 | 3.6 | — | — | — | 27 |
| La. | 10 | 6 | 24 | 4.5 | 6.0 | — | — | — | 41 |
| Okla. | 8 | 6 | 18 | 4.5 | 4.8 | 1 | — | — | 35 |
| Texas | 26 | 6 | 72 | 4.5 | 15.6 | 1 | — | — | 100 |
| | 147 | 78 | 363 | 65 | 88 | 6 | 1 | 2 | 608 |
| **West** | | | | | | | | | |
| Mont. | 4 | 6 | 6 | 4.5 | 2.4 | — | — | 1 | 20 |
| Idaho | 4 | 6 | 6 | 4.5 | 2.4 | 1 | — | 1 | 21 |
| Wyo. | 3 | 6 | 3 | 4.5 | 1.8 | 1 | — | — | 17 |
| Colo. | 7 | 6 | 15 | 4.5 | 4.2 | — | — | 1 | 31 |
| Utah | 4 | 6 | 6 | 4.5 | 2.4 | — | — | — | 19 |
| Nev. | 3 | 6 | 3 | 4.5 | 1.8 | — | — | 1 | 17 |
| N. Mex. | 4 | 6 | 6 | 4.5 | 2.4 | 1 | — | 1 | 21 |
| Ariz. | 6 | 6 | 12 | 4.5 | 3.6 | — | — | 1 | 28 |
| Wash. | 9 | 6 | 21 | 4.5 | 5.4 | — | 1 | — | 38 |



PAGES BOUND VERTICALLY

## EXHIBIT A—Continued

| | 1972 Electoral College Vote | At Large | Three per House Seat | Presidential Bonus: 4.5 | Presidential Bonus: 60% | Other Bonus: Sen. | Other Bonus: Gov. | Other Bonus: H.R. | Total |
|---|---|---|---|---|---|---|---|---|---|
| West—Continued | | | | | | | | | |
| Oreg. | 6 | 6 | 12 | 4.5 | 3.6 | 1 | — | 1 | 29 |
| Calif. | 45 | 6 | 129 | 4.5 | 27.0 | — | — | — | 167 |
| Alaska | 3 | 6 | 3 | 4.5 | 1.8 | 1 | — | — | 17 |
| Hawaii | 4 | 6 | 6 | 4.5 | 2.4 | — | — | — | 19 |
| | 102 | 78 | 228 | 65 | 60 | 5 | 1 | 7 | 444 |
| D.C. | 3 | 14 | — | — | — | — | — | — | 14 |
| TOTAL | 538 | 314 | 1,305 | 245 | 312 | 17 | 7 | 26 | 2,226 |
| P.R. | 0 | 8 | | | | | | | 8 |
| V.I. | 0 | 4 | | | | | | | 4 |
| Guam | 0 | 4 | | | | | | | 4 |
| | | | | | | | | | 2,242 |

## EXHIBIT B

The 1972 vote for the Republican candidate for President represented by each delegate under the 1976 Formula

| State | Number of delegates under 1976 Formula | 1972 vote per delegate |
|---|---|---|
| Florida | 66 | 28,148 |
| Illinois | 101 | 27,606 |
| California | 167 | 27,557 |
| New Jersey | 67 | 27,545 |
| New York | 154 | 27,226 |
| Pennsylvania | 102 | 26,613 |
| Massachusetts | 43 | 25,862 |
| Ohio | 96 | 25,436 |
| Indiana | 54 | 23,680 |
| Michigan | 83 | 23,635 |
| Missouri | 49 | 23,552 |
| Connecticut | 35 | 23,165 |
| Texas | 100 | 22,985 |
| Washington | 38 | 22,030 |
| Wisconsin | 45 | 21,987 |
| Oklahoma | 35 | 21,686 |
| Minnesota | 42 | 21,371 |
| Virginia | 50 | 19,770 |
| Maryland | 42 | 19,745 |
| Alabama | 37 | 19,695 |
| Iowa | 36 | 19,617 |
| North Carolina | 54 | 19,535 |
| Kansas | 32 | 19,369 |
| Colorado | 31 | 19,264 |
| Tennessee | 43 | 18,910 |
| Georgia | 48 | 18,373 |
| Kentucky | 37 | 18,282 |
| West Virginia | 28 | 17,320 |
| Utah | 19 | 17,034 |
| Mississippi | 30 | 16,838 |
| Oregon | 29 | 16,782 |
| Louisiana | 41 | 16,752 |
| Arkansas | 27 | 16,613 |

## EXHIBIT B—Continued

| State | Number of delegates under 1976 Formula | 1972 vote per delegate |
|---|---|---|
| Nebraska | 25 | 16,252 |
| Arizona | 28 | 14,386 |
| South Carolina | 35 | 13,630 |
| Maine | 20 | 12,823 |
| Rhode Island | 19 | 11,599 |
| New Mexico | 21 | 11,219 |
| North Dakota | 17 | 10,242 |
| New Hampshire | 21 | 10,177 |
| Idaho | 21 | 9,494 |
| Montana | 20 | 9,199 |
| Hawaii | 19 | 8,888 |
| South Dakota | 20 | 8,324 |
| Delaware | 17 | 8,256 |
| Vermont | 17 | 6,891 |
| Nevada | 17 | 6,809 |
| Wyoming | 17 | 5,910 |
| Alaska | 17 | 3,256 |
| Dist. of Col. | 14 | 2,515 |
| | 2,226 | |

## EXHIBIT C

The population, based on 1970 census figures, represented by each delegate under the 1976 Formula, based on 1972 election results

| State | Delegates under 1976 Formula | Population per delegate |
|---|---|---|
| Massachusetts | 43 | 132,306 |
| California | 167 | 119,480 |
| New York | 154 | 118,122 |
| Pennsylvania | 102 | 115,627 |
| Texas | 100 | 111,967 |
| Ohio | 96 | 110,959 |
| Illinois | 101 | 110,039 |
| New Jersey | 67 | 106,988 |
| Michigan | 83 | 106,929 |
| Florida | 66 | 102,870 |
| Wisconsin | 45 | 98,176 |
| Indiana | 54 | 96,179 |
| Georgia | 48 | 95,616 |
| Missouri | 49 | 95,457 |
| North Carolina | 54 | 94,112 |
| Maryland | 42 | 93,390 |
| Alabama | 37 | 93,086 |
| Virginia | 50 | 92,970 |
| Tennessee | 43 | 91,260 |
| Minnesota | 42 | 90,597 |
| Washington | 38 | 89,715 |
| Louisiana | 41 | 88,858 |
| Kentucky | 37 | 87,008 |
| Connecticut | 35 | 86,835 |
| Iowa | 36 | 78,473 |
| South Carolina | 35 | 74,015 |
| Mississippi | 30 | 73,897 |
| Oklahoma | 35 | 73,122 |
| Oregon | 29 | 72,117 |
| Arkansas | 27 | 71,233 |
| Colorado | 31 | 71,202 |
| Kansas | 32 | 70,283 |

## EXHIBIT C—Continued

| State | Delegates under 1976 Formula | Population per delegate |
|---|---|---|
| Arizona | 28 | 63,303 |
| West Virginia | 28 | 62,294 |
| Nebraska | 25 | 59,352 |
| Utah | 19 | 55,751 |
| D.C. | 14 | 54,036 |
| Rhode Island | 19 | 49,985 |
| Maine | 20 | 49,683 |
| New Mexico | 21 | 48,381 |
| Hawaii | 19 | 40,522 |
| North Dakota | 17 | 36,339 |
| New Hampshire | 21 | 35,128 |
| Montana | 20 | 34,720 |
| Idaho | 21 | 33,953 |
| South Dakota | 20 | 33,313 |
| Delaware | 17 | 32,241 |
| Nevada | 17 | 28,749 |
| Vermont | 17 | 26,161 |
| Wyoming | 17 | 19,554 |
| Alaska | 17 | 17,775 |
| | 2,226 | 91,278 |
| Puerto Rico | 8 | 339,004 |
| Virgin Islands | 4 | 15,617 |
| Guam | 4 | 21,249 |

## EXHIBIT D

### The Electoral College "factor" (See Note)

| State | (i) 1970 Population | (ii) 1972 Electoral College Vote | (iii) Population per Electoral College Vote | (iv) Electoral College "factor" (*) |
|---|---|---|---|---|
| Alaska | 302,173 | 3 | 100,724 | 4.40 |
| Wyo. | 332,416 | 3 | 110,805 | 4.00 |
| Vt. | 444,732 | 3 | 148,244 | 2.99 |
| Nev. | 488,738 | 3 | 162,913 | 2.73 |
| S. Dak. | 666,257 | 4 | 166,564 | 2.66 |
| Mont. | 694,409 | 4 | 173,602 | 2.56 |
| Idaho | 713,008 | 4 | 178,252 | 2.49 |
| Del. | 548,104 | 3 | 182,701 | 2.43 |
| N.H. | 737,681 | 4 | 184,420 | 2.41 |
| Hawaii | 769,913 | 4 | 192,478 | 2.31 |
| N. Dak. | 617,761 | 3 | 205,920 | 2.15 |
| R.I. | 949,723 | 4 | 237,431 | 1.87 |
| Me. | 993,663 | 4 | 248,416 | 1.79 |
| D.C. | 756,510 | 3 | 252,170 | 1.76 |
| N. Mex. | 1,016,000 | 4 | 254,000 | 1.75 |
| Utah | 1,059,273 | 4 | 264,818 | 1.68 |
| W. Va. | 1,744,237 | 6 | 290,706 | 1.53 |
| Ariz. | 1,772,482 | 6 | 295,414 | 1.50 |
| Nebr. | 1,483,791 | 5 | 296,758 | 1.50 |
| Colo. | 2,207,259 | 7 | 315,323 | 1.41 |
| Miss. | 2,216,912 | 7 | 316,702 | 1.40 |
| Okla. | 2,559,253 | 8 | 319,907 | 1.39 |
| Ark. | 1,923,295 | 6 | 320,549 | 1.38 |
| Kansas | 2,249,071 | 7 | 321,296 | 1.38 |
| S.C. | 2,590,516 | 8 | 323,815 | 1.37 |
| Oreg. | 2,091,385 | 6 | 348,564 | 1.27 |
| Iowa | 2,825,041 | 8 | 353,130 | 1.26 |
| Ky. | 3,219,311 | 9 | 357,701 | 1.24 |
| La. | 3,643,180 | 10 | 364,318 | 1.22 |
| Wash. | 3,409,169 | 9 | 378,797 | 1.17 |
| Conn. | 3,032,217 | 8 | 379,027 | 1.17 |
| Minn. | 3,805,069 | 10 | 380,507 | 1.17 |

## EXHIBIT D—Continued

| State | (i) 1970 Population | (ii) 1972 Electoral College Vote | (iii) Population per Electoral College Vote | (iv) Electoral College "factor" (*) |
|---|---|---|---|---|
| Ga. | 4,589,575 | 12 | 382,465 | 1.16 |
| Ala. | 3,444,165 | 9 | 382,685 | 1.16 |
| Va. | 4,648,494 | 12 | 387,375 | 1.15 |
| Mo. | 4,677,399 | 12 | 389,783 | 1.14 |
| N.C. | 5,082,059 | 13 | 390,928 | 1.13 |
| Md. | 3,922,399 | 10 | 392,240 | 1.13 |
| Tenn. | 3,924,164 | 10 | 392,416 | 1.13 |
| Fla. | 6,789,443 | 17 | 399,379 | 1.11 |
| Ind. | 5,193,669 | 13 | 399,513 | 1.11 |
| Wis. | 4,417,933 | 11 | 401,630 | 1.10 |
| Mass. | 5,689,170 | 14 | 406,369 | 1.09 |
| N.J. | 7,168,164 | 17 | 421,657 | 1.05 |
| Mich. | 8,875,083 | 21 | 422,623 | 1.05 |
| Ohio | 10,652,017 | 25 | 426,081 | 1.04 |
| Ill. | 11,113,976 | 26 | 427,461 | 1.04 |
| Texas | 11,196,730 | 26 | 430,643 | 1.03 |
| Pa. | 11,793,909 | 27 | 436,811 | 1.02 |
| Calif. | 19,953,134 | 45 | 443,403 | 1.00 |
| N.Y. | 18,190,740 | 41 | 443,677 | 1.00 |

NOTE: The Schedule shows (a) the population represented by a member of the Electoral College from each state, and (b) the "factor" by which the representation accorded each state in the Electoral College exceeds New York, which has the smallest representation in proportion to its population.

[* Computed by dividing the number in column (iii) for each state into the number for New York, which has the largest population per Electoral College vote.]

## EXHIBIT E

States which have a majority of the delegates allocated to the states and the District of Columbia under the 1976 Formula, yet cast only 38.6% of the vote for the 1972 Republican presidential nominee

| State | Delegates Under 1976 Formula | 1972 Electoral Vote | Population per 1970 Census | 1972 Vote for Republican Presidential Nominee |
|---|---|---|---|---|
| Alabama | 37 | 9 | 3,444,165 | 728,701 |
| Alaska | 17 | 3 | 302,173 | 55,349 |
| Arizona | 28 | 6 | 1,772,482 | 402,812 |
| Arkansas | 27 | 6 | 1,923,295 | 448,541 |
| Colorado | 31 | 7 | 2,207,259 | 597,189 |
| Delaware | 17 | 3 | 548,104 | 140,357 |
| Dist. of Columbia | 14 | 3 | 756,510 | 35,214 |
| Georgia | 48 | 12 | 4,589,575 | 881,890 |
| Hawaii | 19 | 4 | 769,913 | 168,865 |
| Idaho | 21 | 4 | 713,008 | 199,384 |
| Iowa | 36 | 8 | 2,825,041 | 706,207 |
| Kansas | 32 | 7 | 2,249,071 | 619,812 |
| Kentucky | 37 | 9 | 3,219,311 | 676,446 |
| Louisiana | 41 | 10 | 3,643,180 | 686,852 |
| Maine | 20 | 4 | 993,663 | 246,458 |
| Maryland | 42 | 10 | 3,922,399 | 829,305 |
| Minnesota | 42 | 10 | 3,805,069 | 897,569 |
| Mississippi | 30 | 7 | 2,216,912 | 505,125 |
| Missouri | 49 | 12 | 4,677,399 | 1,154,050 |
| Montana | 20 | 4 | 694,409 | 183,976 |
| Nebraska | 25 | 5 | 1,483,791 | 406,298 |
| Nevada | 17 | 3 | 488,738 | 115,750 |
| New Hampshire | 21 | 4 | 737,681 | 213,724 |
| New Mexico | 21 | 4 | 1,016,000 | 235,606 |
| North Carolina | 54 | 13 | 5,082,059 | 1,054,889 |
| North Dakota | 17 | 3 | 617,761 | 174,109 |
| Oklahoma | 35 | 8 | 2,559,253 | 759,025 |
| Oregon | 29 | 6 | 2,091,385 | 486,686 |

## EXHIBIT E—Continued

| State | Delegates Under 1976 Formula | 1972 Electoral Vote | Population per 1970 Census | 1972 Vote for Republican Presidential Nominee |
|---|---|---|---|---|
| Rhode Island | 19 | 4 | 949,723 | 220,383 |
| South Carolina | 35 | 8 | 2,590,516 | 477,044 |
| South Dakota | 20 | 4 | 666,257 | 166,476 |
| Tennessee | 43 | 10 | 3,924,164 | 813,147 |
| Utah | 19 | 4 | 1,059,273 | 323,643 |
| Vermont | 17 | 3 | 444,732 | 117,149 |
| Virginia | 50 | 12 | 4,648,494 | 988,493 |
| Washington | 38 | 9 | 3,409,169 | 837,135 |
| West Virginia | 28 | 6 | 1,744,237 | 484,964 |
| Wyoming | 17 | 3 | 332,416 | 100,464 |
| Total for 37 States and the District of Columbia | 1,113 | 247 | 79,118,587 | 18,139,087 |
| Total for all 50 States and the District of Columbia | 2,226 | 538 | 203,184,772 | 47,042,923 |
| Percentage Represented by the 37 States and the District of Columbia | 50.0% | 45.9% | 38.9% | 38.6% |

## EXHIBIT F

Apportionment of delegates to the 8 most populated states under the 1976 Formula based on 1972 election results

| State | Population per 1970 Census | 1972 Election Vote for Republican Presidential Nominee | Number of Delegates under 1976 Formula |
|---|---|---|---|
| California | 19,953,134 | 4,602,096 | 167 |
| New York | 18,190,740 | 4,192,778 | 154 |
| Pennsylvania | 11,793,909 | 2,714,521 | 102 |
| Texas | 11,196,730 | 2,298,468 | 100 |
| Illinois | 11,113,976 | 2,788,179 | 101 |
| Ohio | 10,652,017 | 2,441,829 | 96 |
| Michigan | 8,875,083 | 1,961,721 | 83 |
| New Jersey | 7,168,164 | 1,845,502 | 67 |
| Total for 8 most populated states | 98,943,753 | 22,845,094 | 870 |
| Total for all states and the Dist. of Col. | 203,184,772 | 47,042,923 | 2,226 |
| Percentage represented by 8 most populated states | 48.7% | 48.6% | 39.1% |

# EXHIBIT G

## Deviations from the mean on Exhibits B and C

**Mean vote per delegate** 21,133

**Mean population per delegate** 91,278

| State | 1972 Republican Vote | | 1970 population | |
|---|---|---|---|---|
| | per Delegate | Deviation from mean | per Delegate | Deviation from mean |
| Alaska | 3,256 | 84.6% | 17,775 | 80.5% |
| Wyo. | 5,910 | 72.0 | 19,554 | 78.6 |
| Vt. | 6,891 | 67.4 | 26,160 | 71.3 |
| Nev. | 6,809 | 67.8 | 28,749 | 68.5 |
| S. Dak. | 8,324 | 60.6 | 33,313 | 63.5 |
| Mont. | 9,199 | 56.5 | 34,720 | 62.0 |
| Idaho | 9,494 | 55.1 | 33,953 | 62.8 |
| Del. | 8,256 | 60.9 | 32,241 | 64.7 |
| N.H. | 10,177 | 51.8 | 35,128 | 61.5 |
| Hawaii | 8,888 | 57.9 | 40,522 | 55.6 |
| N. Dak. | 10,242 | 51.5 | 36,339 | 60.2 |
| R.I. | 11,599 | 45.1 | 49,985 | 45.2 |
| Me. | 12,823 | 39.3 | 49,683 | 45.6 |
| D.C. | 2,515 | 88.1 | 54,036 | 40.8 |
| N. Mex. | 11,219 | 46.9 | 48,381 | 47.0 |
| Utah | 17,034 | 19.4 | 55,751 | 38.9 |
| W. Va. | 17,320 | 18.0 | 62,294 | 31.8 |
| Ariz. | 14,386 | 31.9 | 63,303 | 30.6 |
| Nebr. | 16,252 | 23.1 | 59,352 | 35.0 |
| Colo. | 19,264 | 8.8 | 71,202 | 22.0 |
| Miss. | 16,838 | 20.3 | 73,897 | 19.0 |
| Okla. | 21,686 | — 2.6 | 73,122 | 19.9 |
| Ark. | 16,613 | 21.4 | 71,233 | 22.0 |
| Kansas | 19,369 | 8.3 | 70,283 | 23.0 |
| S.C. | 13,630 | 35.5 | 74,015 | 18.9 |
| Oreg. | 16,782 | 20.6 | 72,117 | 21.0 |
| Iowa | 19,617 | 7.2 | 78,473 | 14.0 |
| Ky. | 18,282 | 13.5 | 87,008 | 4.7 |
| La. | 16,752 | 20.7 | 88,858 | 2.7 |
| Wash. | 22,030 | — 4.2 | 89,715 | 1.7 |
| Conn. | 23,165 | — 9.6 | 86,635 | 5.1 |

## EXHIBIT G—Continued

| State | 1972 Republican Vote per Delegate | 1972 Republican Vote Deviation from mean | 1970 population per Delegate | 1970 population Deviation from mean |
|---|---|---|---|---|
| Minn. | 21,371 | — 1.1% | 90,597 | 0.7% |
| Ga. | 18,373 | 13.1 | 95,616 | — 4.8 |
| Ala. | 19,695 | 6.8 | 93,086 | — 2.0 |
| Va. | 19,770 | 6.4 | 92,970 | — 1.9 |
| Mo. | 23,552 | —11.4 | 95,457 | — 4.6 |
| N.C. | 19,535 | 7.6 | 94,112 | — 3.1 |
| Md. | 19,745 | 6.6 | 93,390 | — 2.3 |
| Tenn. | 18,910 | 10.5 | 91,260 | — |
| Fla. | 28,148 | —33.2 | 102,870 | —12.7 |
| Ind. | 23,680 | —12.1 | 96,179 | — 5.4 |
| Wis. | 21,987 | 4.0 | 98,176 | — 7.6 |
| Mass. | 25,862 | —22.4 | 132,306 | —45.0 |
| N.J. | 27,545 | —30.3 | 106,988 | —17.2 |
| Mich. | 23,635 | —11.8 | 106,929 | —17.1 |
| Ohio | 25,436 | —20.4 | 110,959 | —21.6 |
| Ill. | 27,606 | —30.6 | 110,039 | —20.6 |
| Texas | 22,985 | — 8.8 | 111,967 | —22.7 |
| Pa. | 26,613 | —25.9 | 115,627 | —26.7 |
| Calif. | 27,557 | —30.4 | 119,480 | —30.9 |
| N.Y. | 27,226 | —28.8 | 118,122 | —29.4 |
| | | ±1492.8 | | ±1494.4 |
| Average deviation | | ±29.3% | | ±29.3% |
| (Divisor: 51) | | | | |
| Largest over-representation | D.C. | 88.1% | Alaska | 80.5% |
| Largest under-representation | Fla. | — 33.2% | Mass. | — 45.0% |
| Maximum deviation | | 121.3% | | 125.5% |

## EXHIBIT H

### Deviations from the mean population represented by members of the Electoral College

**Mean population per Electoral College vote: 377,667**

| State | Electoral College Vote | Population per Electoral College vote | Deviation from mean |
|---|---|---|---|
| Alaska | 3 | 100,724 | 73.3% |
| Wyo. | 3 | 110,805 | 70.7 |
| Vt. | 3 | 148,244 | 60.7 |
| Nev. | 3 | 162,913 | 56.9 |
| S. Dak. | 4 | 166,564 | 55.9 |
| Mont. | 4 | 173,602 | 54.0 |
| Idaho | 4 | 178,252 | 52.8 |
| Del. | 3 | 182,701 | 51.6 |
| N.H. | 4 | 184,420 | 51.2 |
| Hawaii | 4 | 192,478 | 49.0 |
| N. Dak. | 3 | 205,920 | 45.5 |
| R.I. | 4 | 237,431 | 37.1 |
| Me. | 4 | 248,416 | 34.2 |
| D.C. | 3 | 252,170 | 33.2 |
| N. Mex. | 4 | 254,000 | 32.7 |
| Utah | 4 | 264,818 | 29.9 |
| W. Va. | 6 | 290,706 | 23.0 |
| Ariz. | 6 | 295,414 | 21.8 |
| Nebr. | 5 | 296,758 | 21.4 |
| Colo. | 7 | 315,323 | 16.5 |
| Miss. | 7 | 316,702 | 16.1 |
| Okla. | 8 | 319,907 | 15.3 |
| Ark. | 6 | 320,549 | 15.1 |
| Kansas | 7 | 321,296 | 14.9 |
| S.C. | 8 | 323,815 | 14.3 |
| Oreg. | 6 | 348,564 | 7.7 |
| Iowa | 8 | 353,130 | 6.5 |
| Ky. | 9 | 357,701 | 5.3 |
| La. | 10 | 364,318 | 3.5 |
| Wash. | 9 | 378,797 | — 0.3 |
| Conn. | 8 | 379,027 | — 0.4 |
| Minn. | 10 | 380,507 | — 0.8 |

## EXHIBIT H—Continued

| State | Electoral College Vote | Population per Electoral College vote | Deviation from mean |
|---|---|---|---|
| Ga. | 12 | 382,465 | — 1.3% |
| Ala. | 9 | 382,685 | — 1.3 |
| Va. | 12 | 387,375 | — 2.6 |
| Mo. | 12 | 389,783 | — 3.2 |
| N.C. | 13 | 390,928 | — 3.5 |
| Md. | 10 | 392,240 | — 3.9 |
| Tenn. | 10 | 392,416 | — 3.9 |
| Fla. | 17 | 399,379 | — 5.7 |
| Ind. | 13 | 399,513 | — 5.8 |
| Wis. | 11 | 401,630 | — 6.3 |
| Mass. | 14 | 406,369 | — 7.6 |
| N.J. | 17 | 421,657 | —11.6 |
| Mich. | 21 | 422,623 | —11.9 |
| Ohio | 25 | 426,081 | —12.8 |
| Ill. | 26 | 427,461 | —13.2 |
| Texas | 26 | 430,643 | —14.0 |
| Pa. | 27 | 436,811 | —15.7 |
| Calif. | 45 | 443,403 | —17.4 |
| N.Y. | 41 | 443,677 | —17.5 |
| | | | ±1130.8 |
| Average deviation | | | ±22.2% |
| (Divisor: 51) | | | |
| Largest over-representation | | Alaska | 73.3% |
| Largest under-representation | | N.Y. | —17.5% |
| Maximum deviation | | | 90.8% |

## EXHIBIT I

The number of delegates to which each State, the District of Columbia, and the Territories, would be entitled under the formula adopted by the 1972 Republican National Convention for allocation of delegates to the 1976 Convention, based on the results of elections in the years 1968 through 1971

| | 1972 Electoral College Vote | At Large | Three per House Seat | Presidential Bonus: 4.5 | Presidential Bonus: 60% | Other Bonus: Sen. | Other Bonus: Gov. | Other Bonus: H.R. | Total |
|---|---|---|---|---|---|---|---|---|---|
| Northeast | | | | | | | | | |
| Me. | 4 | 6 | 6 | | | | | | 12 |
| N.H. | 4 | 6 | 6 | 4.5 | 2.4 | 1 | 1 | 1 | 22 |
| Vt. | 3 | 6 | 3 | 4.5 | 1.8 | 2 | 1 | 1 | 20 |
| Mass. | 14 | 6 | 36 | | | | 1 | | 43 |
| R.I. | 4 | 6 | 6 | | | | | | 12 |
| Conn. | 8 | 6 | 18 | | | 1 | 1 | | 26 |
| N.Y. | 41 | 6 | 117 | | | 1 | 1 | | 125 |
| N.J. | 17 | 6 | 45 | 4.5 | 10.2 | | 1 | | 67 |
| Del. | 3 | 6 | 3 | 4.5 | 1.8 | 1 | 1 | 1 | 19 |
| Md. | 10 | 6 | 24 | | | 2 | | | 32 |
| Pa. | 27 | 6 | 75 | | | 2 | | | 83 |
| W. Va. | 6 | 6 | 12 | | | | 1 | | 19 |
| | 141 | 72 | 351 | 20 | 16 | 10 | 8 | 3 | 480 |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| **Middle West** | | | | | | | | | | |
| Ohio | 25 | 6 | 69 | 4.5 | 15 | 2 | | 1 | 98 | |
| Mich. | 21 | 6 | 57 | | | | 1 | 1 | 65 | |
| Ind. | 13 | 6 | 33 | 4.5 | 7.8 | | 1 | 1 | 54 | |
| Ill. | 26 | 6 | 72 | 4.5 | 15.6 | 1 | 1 | | 101 | |
| Wis. | 11 | 6 | 27 | 4.5 | 6.6 | | 1 | 1 | 47 | |
| Minn. | 10 | 6 | 24 | | | | | 1 | 31 | |
| Iowa | 8 | 6 | 18 | 4.5 | 4.8 | | 1 | 1 | 36 | |
| Mo. | 12 | 6 | 30 | 4.5 | 7.2 | | | | 48 | |
| N. Dak. | 3 | 6 | 3 | 4.5 | 1.8 | 1 | | 1 | 18 | |
| S. Dak. | 4 | 6 | 6 | 4.5 | 2.4 | | 1 | 1 | 21 | |
| Nebr. | 5 | 6 | 9 | 4.5 | 3 | 1 | | 1 | 25 | |
| Kansas | 7 | 6 | 15 | 4.5 | 4.2 | 1 | | 1 | 32 | |
| | 145 | 72 | 363 | 50 | 69 | 6 | 6 | 10 | 576 | |
| **South** | | | | | | | | | | |
| Va. | 12 | 6 | 30 | 4.5 | 7.2 | | 1 | 1 | 50 | |
| N.C. | 13 | 6 | 33 | 4.5 | 7.8 | | | | 52 | |
| S.C. | 8 | 6 | 18 | 4.5 | 4.8 | | | | 34 | |
| Ga. | 12 | 6 | 30 | | | | | | 36 | |
| Fla. | 17 | 6 | 45 | 4.5 | 10.2 | 1 | | | 67 | |
| Ky. | 9 | 6 | 21 | 4.5 | 5.4 | 1 | | | 38 | |
| Tenn. | 10 | 6 | 24 | 4.5 | 6 | 1 | 1 | | 43 | |
| Ala. | 9 | 6 | 21 | | | | | | 27 | |

## EXHIBIT I—Continued

| | 1972 Electoral College Vote | At Large | Three per House Seat | Presidential Bonus: 4.5 | Presidential Bonus: 60% | Other Bonus: Sen. | Other Bonus: Gov. | Other Bonus: H.R. | Total |
|---|---|---|---|---|---|---|---|---|---|
| South—Continued | | | | | | | | | |
| Miss. | 7 | 6 | 15 | | | | | | 21 |
| Ark. | 6 | 6 | 12 | | | | 1 | | 19 |
| La. | 10 | 6 | 24 | | | | | | 30 |
| Okla. | 8 | 6 | 18 | 4.5 | 4.8 | 1 | | | 35 |
| Texas | 26 | 6 | 72 | | | | | | 78 |
| | 147 | 78 | 363 | 35 | 46 | 4 | 3 | 1 | 530 |
| West | | | | | | | | | |
| Mont. | 4 | 6 | 6 | 4.5 | 2.4 | | | | 19 |
| Idaho | 4 | 6 | 6 | 4.5 | 2.4 | | | 1 | 20 |
| Wyo. | 3 | 6 | 3 | 4.5 | 1.8 | | 1 | 1 | 18 |
| Col. | 7 | 6 | 15 | 4.5 | 4.2 | 1 | 1 | | 32 |
| Utah | 4 | 6 | 6 | 4.5 | 2.4 | 1 | | 1 | 21 |
| Nev. | 3 | 6 | 3 | 4.5 | 1.8 | | | | 16 |
| N. Mex. | 4 | 6 | 6 | 4.5 | 2.4 | | 1 | 1 | 21 |
| Ariz. | 6 | 6 | 12 | 4.5 | 3.6 | | | 1 | 28 |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Wash. | 9 | 6 | 21 | | | | 1 | | 28 |
| Oreg. | 6 | 6 | 12 | 4.5 | 3.6 | 1 | 1 | | 29 |
| Calif. | 45 | 6 | 129 | 4.5 | 27 | | 1 | | 168 |
| Alaska | 3 | 6 | 3 | 4.5 | 1.8 | 1 | | 1 | 18 |
| *Hawaii | 4 | 6 | 6 | | | 1 | | | 14 |
| | 102 | 78 | 228 | 55 | 54 | 5 | 6 | 6 | 432 |
| D.C. | 3 | 14 | — | — | — | – | – | – | 14 |
| TOTAL | 538 | 314 | 1,305 | 160 | 185 | 25 | 23 | 20 | 2,032 |
| P.R. | 0 | 8 | | | | | | | 8 |
| V.I. | 0 | 4 | | | | | | | 4 |
| Guam | 0 | 4 | | | | | | | 4 |
| | 0 | 16 | | | | | | | 16 |
| | | | | | | | | | 2,048 |

* 1 delegate added to equal number at the 1972 Convention. See para. A.6 of Rule 30.

## EXHIBIT J

The 1968 vote for the Republican nominee for President represented by each delegate, and the 1970 population represented by each delegate, under the 1976 Formula, on the basis of 1968-1971 election results

| | Number of Delegates under "1976 Formula" | 1968 Republican Vote | | 1970 Population | |
|---|---|---|---|---|---|
| | | Total | Per Delegate | Total | Per Delegate |
| **Northeast** | | | | | |
| Me. | 12 | 169,254 | 14,105 | 993,663 | 82,805 |
| N.H. | 22 | 154,903 | 7,041 | 737,681 | 33,531 |
| Vt. | 20 | 85,142 | 4,257 | 444,732 | 22,237 |
| Mass. | 43 | 766,844 | 17,834 | 5,689,170 | 132,306 |
| R.I. | 12 | 122,359 | 10,197 | 949,723 | 79,144 |
| Conn. | 26 | 556,721 | 21,412 | 3,032,217 | 116,624 |
| N.Y. | 125 | 3,007,932 | 24,063 | 18,190,740 | 145,526 |
| N.J. | 67 | 1,325,467 | 19,783 | 7,168,164 | 106,988 |
| Del. | 19 | 96,714 | 5,090 | 548,104 | 28,848 |
| Md. | 32 | 517,995 | 16,187 | 3,922,399 | 122,575 |
| Pa. | 83 | 2,090,017 | 25,181 | 11,793,909 | 142,095 |
| W. Va. | 19 | 307,555 | 16,187 | 1,744,237 | 91,802 |
| | 480 | 9,200,903 | 19,169 | 55,214,739 | 115,031 |
| **Middle West** | | | | | |
| Ohio | 98 | 1,791,014 | 18,276 | 10,652,017 | 108,694 |
| Mich. | 65 | 1,370,665 | 21,087 | 8,875,083 | 136,540 |
| Ind. | 54 | 1,067,885 | 19,776 | 5,193,669 | 96,179 |
| Ill. | 101 | 2,174,774 | 21,532 | 11,113,976 | 110,039 |
| Wis. | 47 | 809,997 | 17,234 | 4,417,933 | 93,999 |
| Minn. | 31 | 658,643 | 21,247 | 3,805,069 | 122,744 |
| Iowa | 36 | 619,106 | 17,197 | 2,825,041 | 78,473 |
| Mo. | 48 | 811,932 | 16,915 | 4,677,399 | 97,446 |
| N. Dak. | 18 | 138,669 | 7,704 | 617,761 | 34,320 |
| S. Dak. | 21 | 149,841 | 7,135 | 666,257 | 31,727 |
| Nebr. | 25 | 321,163 | 12,847 | 1,483,791 | 59,352 |
| Kansas | 32 | 478,674 | 14,959 | 2,249,071 | 70,283 |
| | 576 | 10,392,363 | 18,042 | 56,577,067 | 98,224 |

## EXHIBIT J—Continued

| | Number of Delegates under "1976 Formula" | 1968 Republican Vote | | 1970 Population | |
|---|---|---|---|---|---|
| | | Total | Per Delegate | Total | Per Delegate |
| South | | | | | |
| Va. | 50 | 590,319 | 11,806 | 4,648,494 | 92,970 |
| N.C. | 52 | 627,192 | 12,061 | 5,082,059 | 97,732 |
| S.C. | 34 | 254,062 | 7,472 | 2,590,516 | 76,192 |
| Ga. | 36 | 380,111 | 10,559 | 4,589,575 | 127,488 |
| Fla. | 67 | 886,804 | 13,236 | 6,789,443 | 101,335 |
| Ky. | 38 | 462,411 | 12,169 | 3,219,311 | 84,719 |
| Tenn. | 43 | 472,592 | 10,991 | 3,924,164 | 91,260 |
| Ala. | 27 | 146,923 | 5,442 | 3,444,165 | 127,562 |
| Miss. | 21 | 88,516 | 4,215 | 2,216,912 | 105,567 |
| Ark. | 19 | 190,759 | 10,040 | 1,923,295 | 101,226 |
| La. | 30 | 257,535 | 8,585 | 3,643,180 | 121,439 |
| Okla. | 35 | 449,697 | 12,848 | 2,559,253 | 73,122 |
| Texas | 78 | 1,227,844 | 15,742 | 11,196,730 | 143,548 |
| | 530 | 6,034,765 | 11,386 | 55,827,097 | 105,334 |
| West | | | | | |
| Mont. | 19 | 138,835 | 7,307 | 694,409 | 36,548 |
| Idaho | 20 | 165,369 | 8,268 | 713,008 | 35,650 |
| Wyo. | 18 | 70,927 | 3,940 | 332,416 | 18,468 |
| Colo. | 32 | 409,345 | 12,792 | 2,207,259 | 68,977 |
| Utah | 21 | 238,728 | 11,368 | 1,059,273 | 50,442 |
| Nev. | 16 | 73,188 | 4,574 | 488,738 | 30,546 |
| N. Mex. | 21 | 169,692 | 8,081 | 1,016,000 | 48,381 |
| Ariz. | 28 | 266,721 | 9,526 | 1,772,482 | 63,303 |
| Wash. | 28 | 588,510 | 21,018 | 3,409,169 | 121,756 |
| Oreg. | 29 | 408,433 | 14,084 | 2,091,385 | 72,117 |
| Calif. | 168 | 3,467,664 | 20,641 | 19,953,134 | 118,769 |
| Alaska | 18 | 37,600 | 2,089 | 302,173 | 16,787 |
| Hawaii | 14 | 91,425 | 6,530 | 769,913 | 54,994 |
| | 432 | 6,126,437 | 14,182 | 34,809,359 | 80,577 |
| D.C. | 14 | 31,012 | 2,215 | 756,510 | 54,036 |
| | 2,032 | 31,785,480 | 15,642 | 203,184,772 | 99,993 |
| Territories | | | | | |
| P.R. | 8 | 0 | 0 | 2,712,033 | 339,004 |
| V.I. | 4 | 0 | 0 | 62,468 | 15,617 |
| Guam | 4 | 0 | 0 | 84,996 | 21,249 |
| | 16 | | | | |
| **TOTAL** | **2,048** | | | | |

# EXHIBIT K

## Deviations from the mean on Exhibit J

Mean vote per delegate 15,642

Mean population per delegate 99,993

| State | 1968 Republican Vote | | 1970 population | |
|---|---|---|---|---|
| | per Delegate | Deviation from mean | per Delegate | Deviation from mean |
| Alaska | 2,089 | 86.6% | 16,787 | 83.2% |
| Wyo. | 3,940 | 74.8 | 18,468 | 81.5 |
| Vt. | 4,257 | 72.8 | 22,237 | 77.8 |
| Nev. | 4,574 | 70.8 | 30,546 | 69.5 |
| S. Dak. | 7,135 | 54.5 | 31,727 | 68.3 |
| Mont. | 7,307 | 53.3 | 36,548 | 63.4 |
| Idaho | 8,268 | 47.1 | 35,650 | 64.3 |
| Del. | 5,090 | 67.5 | 28,848 | 71.1 |
| N.H. | 7,041 | 55.0 | 33,531 | 66.5 |
| Hawaii | 6,530 | 58.3 | 54,994 | 45.0 |
| N. Dak. | 7,704 | 50.7 | 34,320 | 65.7 |
| R.I. | 10,197 | 34.8 | 79,144 | 20.9 |
| Me. | 14,105 | 9.8 | 82,805 | 17.2 |
| D.C. | 2,215 | 85.8 | 54,036 | 46.0 |
| N. Mex. | 8,081 | 48.3 | 48,381 | 51.6 |
| Utah | 11,368 | 27.3 | 50,442 | 49.6 |
| W. Va. | 16,187 | — 3.5 | 91,802 | 8.2 |
| Ariz. | 9,526 | 39.1 | 63,303 | 36.7 |
| Nebr. | 12,847 | 17.9 | 59,352 | 40.6 |
| Colo. | 12,792 | 18.2 | 68,977 | 31.0 |
| Miss. | 4,215 | 73.1 | 105,567 | — 5.6 |
| Okla. | 12,848 | 17.9 | 73,122 | 26.9 |
| Ark. | 10,040 | 35.8 | 101,226 | — 1.2 |
| Kansas | 14,959 | 4.4 | 70,283 | 29.7 |
| S.C. | 7,472 | 52.2 | 76,192 | 23.8 |
| Oreg. | 14,084 | 10.0 | 72,117 | 27.9 |
| Iowa | 17,197 | — 9.9 | 78,473 | 21.5 |
| Ky. | 12,169 | 22.2 | 84,719 | 15.3 |
| La. | 8,585 | 45.1 | 121,439 | —21.4 |
| Wash. | 21,018 | —34.4 | 121,756 | —21.8 |
| Conn. | 21,412 | —36.9 | 116,624 | —16.6 |
| Minn. | 21,247 | —35.8 | 122,744 | —22.8 |

## EXHIBIT K—Continued

| State | 1968 Republican Vote per Delegate | 1968 Republican Vote Deviation from mean | 1970 population per Delegate | 1970 population Deviation from mean |
|---|---|---|---|---|
| Ga. | 10,559 | 32.5% | 127,488 | −27.5% |
| Ala. | 5,442 | 65.2 | 127,562 | −27.6 |
| Va. | 11,806 | 24.5 | 92,970 | 7.0 |
| Mo. | 16,915 | − 8.1 | 97,446 | 2.5 |
| N.C. | 12,061 | 22.9 | 97,732 | 2.3 |
| Md. | 16,187 | − 3.5 | 122,575 | −22.6 |
| Tenn. | 10,991 | 29.7 | 91,260 | 8.7 |
| Fla. | 13,236 | 15.4 | 101,335 | − 1.3 |
| Ind. | 19,776 | −26.4 | 96,179 | 3.8 |
| Wis. | 17,234 | −10.2 | 93,999 | 6.0 |
| Mass. | 17,834 | −14.0 | 132,306 | −32.3 |
| N.J. | 19,783 | −26.5 | 106,988 | − 7.0 |
| Mich. | 21,087 | −34.8 | 136,540 | −36.5 |
| Ohio | 18,276 | −16.8 | 108,694 | − 8.7 |
| Ill. | 21,532 | −37.7 | 110,039 | −10.0 |
| Tex. | 15,742 | − 0.6 | 143,548 | −43.6 |
| Pa. | 25,181 | −61.0 | 142,095 | −42.1 |
| Calif. | 20,641 | −32.0 | 118,769 | −18.8 |
| N.Y. | 24,063 | −53.8 | 145,526 | −45.5 |
| | | ±1869.4 | | ±1646.4 |
| Average deviation (Divisor: 51) | | ±36.7 | | ±32.3% |
| Largest over-representation | Alaska | 86.6% | Alaska | 83.2% |
| Largest under-representation | Pa. | − 61.0% | N.Y. | − 45.5% |
| Maximum deviation | | 147.6% | | 128.7% |

## EXHIBIT L

The 1968 vote for the Republican nominee for President represented by each delegate, and the 1970 population represented by each delegate, under the 1976 Formula, *exclusive of any uniform victory bonuses*, on the basis of 1968-1971 election results

| | Number of Delegates under modified 1976 Formula | 1968 Republican Vote | | 1970 Population | |
|---|---|---|---|---|---|
| | | Total | Per Delegate | Total | Per Delegate |
| **Northeast** | | | | | |
| Me. | 12 | 169,254 | 14,105 | 993,663 | 82,805 |
| N.H. | 15 | 154,903 | 10,327 | 737,681 | 49,179 |
| Vt. | 11 | 85,142 | 7,740 | 444,732 | 40,430 |
| Mass. | 42 | 766,844 | 18,258 | 5,689,170 | 135,456 |
| R.I. | 12 | 122,359 | 10,197 | 949,723 | 79,144 |
| Conn. | 24 | 556,721 | 23,197 | 3,032,217 | 126,342 |
| N.Y. | 123 | 3,007,932 | 24,455 | 18,190,740 | 147,892 |
| N.J. | 62 | 1,325,467 | 21,379 | 7,168,164 | 115,616 |
| Del. | 11 | 96,714 | 8,792 | 548,104 | 49,828 |
| Md. | 30 | 517,995 | 17,267 | 3,922,399 | 130,747 |
| Pa. | 81 | 2,090,017 | 25,803 | 11,793,909 | 145,604 |
| W. Va. | 18 | 307,555 | 17,866 | 1,744,237 | 96,902 |
| | 441 | 9,200,903 | 20,864 | 55,214,739 | 125,203 |
| **Middle West** | | | | | |
| Ohio | 90 | 1,791,014 | 19,900 | 10,652,017 | 118,356 |
| Mich. | 63 | 1,370,665 | 21,757 | 8,875,083 | 140,874 |
| Ind. | 47 | 1,067,885 | 22,721 | 5,193,669 | 110,504 |
| Ill. | 94 | 2,174,774 | 23,136 | 11,113,976 | 118,234 |
| Wis. | 40 | 809,997 | 20,250 | 4,417,933 | 110,448 |
| Minn. | 30 | 658,643 | 21,955 | 3,805,069 | 126,836 |
| Iowa | 29 | 619,106 | 21,348 | 2,825,041 | 97,415 |
| Mo. | 44 | 811,932 | 18,453 | 4,677,399 | 106,305 |
| N. Dak. | 11 | 138,669 | 12,606 | 617,761 | 56,160 |
| S. Dak. | 15 | 149,841 | 9,989 | 666,257 | 44,417 |
| Nebr. | 18 | 321,163 | 17,842 | 1,483,791 | 82,433 |
| Kansas | 25 | 478,674 | 19,147 | 2,249,071 | 89,963 |
| | 506 | 10,392,363 | 20,538 | 56,577,067 | 111,812 |

EXHIBIT L—Continued

| | Number of Delegates under modified 1976 Formula | 1968 Republican Vote | | 1970 Population | |
|---|---|---|---|---|---|
| | | Total | Per Delegate | Total | Per Delegate |
| South | | | | | |
| Va. | 44 | 590,319 | 13,416 | 4,648,494 | 105,648 |
| N.C. | 47 | 627,192 | 13,345 | 5,082,059 | 108,129 |
| S.C. | 29 | 254,062 | 8,761 | 2,590,516 | 89,328 |
| Ga. | 36 | 380,111 | 10,559 | 4,589,575 | 127,488 |
| Fla. | 62 | 886,804 | 14,303 | 6,789,443 | 109,507 |
| Ky. | 33 | 462,411 | 14,012 | 3,219,311 | 97,555 |
| Tenn. | 36 | 472,592 | 13,128 | 3,924,164 | 109,005 |
| Ala. | 27 | 146,923 | 5,442 | 3,444,165 | 127,562 |
| Miss. | 21 | 88,516 | 4,215 | 2,216,912 | 105,567 |
| Ark. | 18 | 190,759 | 10,598 | 1,923,295 | 106,850 |
| La. | 30 | 257,535 | 8,585 | 3,643,180 | 121,439 |
| Okla. | 29 | 449,697 | 15,507 | 2,559,253 | 88,250 |
| Texas | 78 | 1,227,844 | 15,742 | 11,196,730 | 143,548 |
| | 490 | 6,034,765 | 12,316 | 55,827,097 | 113,933 |
| West | | | | | |
| Mont. | 15 | 138,835 | 9,255 | 694,409 | 46,294 |
| Idaho | 15 | 165,369 | 11,024 | 713,008 | 47,534 |
| Wyo. | 11 | 70,927 | 6,448 | 332,416 | 30,220 |
| Colo. | 26 | 409,345 | 15,744 | 2,207,259 | 84,895 |
| Utah | 15 | 238,728 | 15,915 | 1,059,273 | 70,618 |
| Nev. | 11 | 73,188 | 6,563 | 488,738 | 44,431 |
| N. Mex. | 15 | 169,692 | 11,313 | 1,016,000 | 67,733 |
| Ariz. | 22 | 266,721 | 12,124 | 1,772,482 | 80,567 |
| Wash. | 27 | 588,510 | 21,797 | 3,409,169 | 126,266 |
| Oreg. | 22 | 408,433 | 18,565 | 2,091,385 | 95,063 |
| Calif. | 162 | 3,467,664 | 21,405 | 19,953,134 | 123,167 |
| Alaska | 11 | 37,600 | 3,418 | 302,173 | 27,470 |
| Hawaii | 12 | 91,425 | 7,619 | 769,913 | 64,159 |
| | 364 | 6,126,437 | 16,831 | 34,809,359 | 95,360 |
| D.C. | 14 | 31,012 | 2,215 | 756,510 | 54,036 |
| | 1,815 | 31,785,480 | 17,513 | 203,184,772 | 111,948 |
| Territories | | | | | |
| P.R. | 8 | 0 | | 2,712,035 | |
| V.I. | 4 | 0 | | 62,468 | |
| Guam | 4 | 0 | | 84,996 | |
| | 16 | | | | |
| TOTAL | 1,831 | | | | |

# EXHIBIT M

## Deviations from the mean on Exhibit L

Mean vote per delegate 17,513

Mean population per delegate 111,948

| State | 1968 Republican Vote | | 1970 population | |
|---|---|---|---|---|
| | per Delegate | Deviation from mean | per Delegate | Deviation from mean |
| Alaska | 3,418 | 80.5% | 27,470 | 75.5% |
| Wyo. | 6,448 | 63.2 | 30,220 | 73.0 |
| Vt. | 7,740 | 55.8 | 40,430 | 63.9 |
| Nev. | 6,653 | 62.0 | 44,431 | 60.3 |
| S. Dak. | 9,989 | 43.0 | 44,417 | 60.3 |
| Mont. | 9,255 | 47.2 | 46,294 | 58.6 |
| Idaho | 11,024 | 37.1 | 47,534 | 57.5 |
| Del. | 8,792 | 49.8 | 49,828 | 55.5 |
| N.H. | 10,327 | 41.0 | 49,179 | 56.1 |
| Hawaii | 7,619 | 56.5 | 64,159 | 42.7 |
| N. Dak. | 12,606 | 28.0 | 56,160 | 49.8 |
| R.I. | 10,197 | 41.8 | 79,144 | 29.3 |
| Me. | 14,105 | 19.5 | 82,805 | 26.0 |
| D.C. | 2,215 | 87.4 | 54,036 | 51.7 |
| N. Mex. | 11,313 | 35.4 | 67,733 | 39.5 |
| Utah | 15,915 | 9.1 | 70,618 | 36.9 |
| W. Va. | 17,866 | — 2.0 | 96,902 | 13.4 |
| Ariz. | 12,124 | 30.8 | 80,567 | 28.0 |
| Nebr. | 17,842 | — 1.9 | 82,433 | 26.4 |
| Colo. | 15,744 | 10.1 | 84,895 | 24.2 |
| Miss. | 4,215 | 75.9 | 105,567 | 5.7 |
| Okla. | 15,507 | 11.5 | 88,250 | 21.2 |
| Ark. | 10,598 | 39.5 | 106,850 | 4.6 |
| Kansas | 19,147 | — 9.3 | 89,963 | 19.6 |
| S.C. | 8,761 | 50.0 | 89,328 | 20.2 |
| Oreg. | 18,565 | — 6.0 | 95,063 | 15.1 |
| Iowa | 21,348 | —21.9 | 97,415 | 13.0 |
| Ky. | 14,012 | 20.0 | 97,555 | 12.9 |
| La. | 8,585 | 51.0 | 121,439 | — 8.5 |
| Wash. | 21,797 | —24.5 | 126,266 | —12.8 |
| Conn. | 23,197 | —32.5 | 126,342 | —12.9 |
| Minn. | 21,955 | —25.4 | 126,836 | —13.3 |

## EXHIBIT M—Continued

| | 1968 Republican Vote | | 1970 population | |
|---|---|---|---|---|
| | per Delegate | Deviation from mean | per Delegate | Deviation from mean |
| Ga. | 10,559 | 39.7% | 127,488 | −13.9% |
| Ala. | 5,442 | 68.9 | 127,562 | −14.0 |
| Va. | 13,416 | 23.4 | 105,648 | 5.6 |
| Mo. | 18,453 | − 5.4 | 106,305 | 5.0 |
| N.C. | 13,345 | 23.8 | 108,129 | 3.4 |
| Md. | 17,267 | 1.4 | 130,747 | −16.8 |
| Tenn. | 13,128 | 25.0 | 109,005 | 2.6 |
| Fla. | 14,303 | 18.3 | 109,507 | 2.2 |
| Ind. | 22,721 | −29.7 | 110,504 | 1.3 |
| Wis. | 20,250 | −15.6 | 110,448 | 1.3 |
| Mass. | 18,258 | − 4.3 | 135,456 | −21.0 |
| N.J. | 21,379 | −22.1 | 115,616 | − 3.3 |
| Mich. | 21,757 | −24.2 | 140,874 | −25.8 |
| Ohio | 19,900 | −13.6 | 118,356 | − 5.7 |
| Ill. | 23,136 | −32.1 | 118,234 | − 5.6 |
| Texas | 15,742 | 10.1 | 143,548 | −28.2 |
| Pa. | 25,803 | −47.3 | 145,604 | −30.1 |
| Calif. | 21,405 | −22.2 | 123,167 | −10.0 |
| N.Y. | 24,455 | −39.6 | 147,892 | −32.1 |
| | | ±1636.3 | | ±1316.3 |
| Average deviation | | ±32.1 | | ±25.8 |
| (Divisor: 51) | | | | |
| Largest over-representation | D.C. | 87.4% | Alaska | 75.5% |
| Largest under-representation | Pa. | − 47.3% | Pa. | — 30.1% |
| Maximum deviation | | 134.7% | | 105.6% |

MOTION FILED
DEC 22 1975

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75- 884

THE RIPON SOCIETY, INC., *et al.*,
*Petitioners*

v.

NATIONAL REPUBLICAN PARTY AND
REPUBLICAN NATIONAL COMMITTEE,
*Respondents*

## BRIEF AMICUS CURIAE OF CERTAIN REPUBLICAN PARTY OFFICEHOLDERS IN SUPPORT OF THE RIPON SOCIETY'S PETITION FOR A WRIT OF CERTIORARI, TOGETHER WITH MOTION FOR LEAVE TO FILE SAID BRIEF

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

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No. 75-

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THE RIPON SOCIETY, INC., *et al.*,
*Petitioners*

v.

NATIONAL REPUBLICAN PARTY AND
REPUBLICAN NATIONAL COMMITTEE,
*Respondents*

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## MOTION OF CERTAIN REPUBLICAN PARTY OFFICE-HOLDERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE RIPON SOCIETY'S PETITION FOR A WRIT OF CERTIORARI

---

United States Senators Edward W. Brooke of Massachusetts, Charles H. Percy of Illinois, Lowell P. Weicker, Jr. of Connecticut, Congressmen/women John B. Anderson of Illinois, Edward G. Biester, Jr. of Pennsylvania, Silvio O. Conte of Massachusetts, Millicent Fenwick of New Jersey, Paul Findley of Illinois, Bill Frenzel of Minnesota, Gilbert Gude of Maryland, Margaret M. Heckler of Massachusetts, H. John Heinz III of Pennsylvania, Stewart B. McKinney of Connecticut, Peter A. Peyser of New York, Thomas F. Railsback of Illinois, Massachusetts State Republican Chairman John W. Sears, and Vincent F. Albano, Jr., Chairman of the New York

County Republican Committee, for himself and the Committee (herein referred to as the "Amicus Republicans"), by their attorney, respectfully move the Court for leave to file the attached brief *amicus curiae* in support of the Ripon Society's petition for a writ of *certiorari*, as provided in Rule 42 of the Rules of this Court. The consent of the attorneys for the petitioners has been obtained. The consent of the attorneys for the respondents was requested but refused.

Each of the Amicus Republicans has served in governmental and/or Republican Party positions for many years. All have been active in every phase of state and national party politics. Most have attended at least one Republican National Convention, and together they have participated in every Republican National Convention since 1960. Their deep interest in and long service to the GOP is beyond question and provides the basis on which the views they express in the annexed brief deserve the attention of this Court.*

The constitutionality of the formula by which delegates to the National Convention are apportioned between the states—and the outcome of this suit—are of immediate, practical concern to each of the Amicus Republicans, because continued use of the present inequita-

* Other groups with similar interests and expertise have been permitted to participate in earlier stages of this litigation. The Republican State Committees of Delaware and Wyoming were granted leave to appear as *amici curiae* in the original district court proceedings in this case. 343 F. Supp. 168, 169 (1972). The Republican State Central Committees of Arizona, Georgia, Hawaii, Idaho, Louisiana, Mississippi, Montana, Nevada, New Mexico, Oregon, South Carolina, Utah, and Washington were allowed to intervene to apply for a stay of the district court's injunction prior to the 1972 Convention. 409 U.S. 1222 (1972). The *en banc* District of Columbia Court of Appeals invited the Democratic National Committee to argue and submit a brief *amicus curiae* in 1975. And of course both petitioners and respondents supported their district court motions for summary judgment with affidavits of persons and organizations engaged in Republican Party and national convention activities.

ble formula may determine the selection of the Party's presidential and vice-presidential candidates, as well as significantly affect the rules that will govern future conventions and the platform on which they and other Republicans must run. These experienced politicians and officeholders would expect to contribute to the Court's understanding of (1) the impact of the "victory bonus" on the functioning of the National Convention, (2) the degree to which the present apportionment has permitted self-perpetuating, small-state, regional factions of the Party to dominate national conventions to the disadvantage of Republicans from larger states and other areas of the country, (3) the inadequacies of the political arguments advanced by the Court of Appeals and the respondent Republican National Committee in defense of the rationality of the present allocation plan, and (4) the recent history of the intra-Party dispute over Convention apportionment, the prospect for further litigation and attendant confusion in light of the *en banc* Court's unwillingness to resolve the threshold questions of state action and justiciability, and the need for a definitive judicial ruling on these issues.

On all of these matters—the constitutional relevance of which is readily apparent—the Amicus Republicans have special expertise and a unique perspective that will enable them to provide the Court with valuable counsel. The parties herein have been long involved in the legal issues presented by this case and are hardly newcomers to the realm of practical politics. Neither the Republican National Committee nor the Ripon Society, however, is composed of officeholders whose efforts to win reelection in November 1976 will be directly affected by the composition, deliberations, and performance of next year's Republican National Convention. It is in recognition of this fact that the Amicus Republicans seek leave to present the brief attached hereto.

For the foregoing reasons, the Amicus Republicans respectfully request that this motion be granted so that they may be allowed to file their brief in support of the petition of the Ripon Society for a writ of *certiorari* in this cause to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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December 22, 1975

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

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No. 75-

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THE RIPON SOCIETY, INC., *et al.*,
*Petitioners*

v.

NATIONAL REPUBLICAN PARTY AND
REPUBLICAN NATIONAL COMMITTEE,
*Respondents*

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## BRIEF AMICUS CURIAE OF CERTAIN REPUBLICAN PARTY OFFICEHOLDERS IN SUPPORT OF THE RIPON SOCIETY'S PETITION FOR A WRIT OF CERTIORARI

---

This brief *amicus curiae* is filed on behalf of United States Senators Edward W. Brooke of Massachusetts, Charles H. Percy of Illinois, Lowell P. Weicker, Jr. of Connecticut, Congressmen/women John B. Anderson of Illinois, Edward G. Biester, Jr. of Pennsylvania, Silvio O. Conte of Massachusetts, Millicent Fenwick of New Jersey, Paul Findley of Illinois, Bill Frenzel of Minnesota, Gilbert Gude of Maryland, Margaret M. Heckler of Massachusetts, H. John Heinz III of Pennsylvania, Stewart B. McKinney of Connecticut, Peter A. Peyser of New York, Thomas F. Railsback of Illinois, Massachusetts State Republican Chairman John W. Sears, and Vincent F. Albano, Jr., Chairman of the New York County Republican Committee, for himself and the Committee (herein referred to as the "Amicus Republicans"). These elected Republican Party officeholders call upon the

Court to issue a writ of *certiorari* in this cause to the Court of Appeals for the District of Columbia Circuit, as urged by the Ripon Society, *et al.*, plaintiffs and cross-appellants below.

## INTEREST OF AMICI CURIAE

The interest of the Amicus Republicans, all of whom are elected Republican Party officeholders intimately concerned with the operation of the GOP's quadrennial national nominating conventions, is set forth at pages two and three of the motion for leave to file to which this brief is annexed.

## ARGUMENT

The decision of the Court of Appeals on rehearing *en banc* is fatally unsound in a number of respects, as is amply demonstrated in the Ripon Society's petition for *certiorari*. In order to fully appreciate the detrimental consequences of a failure to reverse the *en banc* Court's ruling, though, it is desirable to highlight several points: (1) the "victory bonus" will have a significant (if arbitrary) impact on the functioning of the 1976 National Convention; (2) the present apportionment plan has permitted self-perpetuating, small-state, regional factions of the Party to dominate national conventions to the disadvantage of Republicans from larger states and other areas of the country; (3) the political arguments advanced by the Court of Appeals and the respondent Republican National Committee in defense of the rationality of the present allocation plan are seriously deficient; and (4) the recent history of the intra-Party dispute over Convention apportionment, and the prospect for further litigation and attendant confusion in light of the *en banc* Court's unwillingness to resolve the threshold questions of state action and justiciability, heighten the already pressing need for a definitive judicial ruling on these issues.

**Impact of the Victory Bonus**

While the Court of Appeals did not question the substantial effect of the Rule 30 victory bonus on the composition of the National Convention, the enormity of bonus' electoral impact must be stressed. At Kansas City in 1976 more than one out of every four delegates will have been awarded on the basis of the bonus formula. Over 600 of the roughly 2200 delegates—or nearly 30 percent of all the delegates—are apportioned to the states by this method. Needless to say, the votes of these delegates may well determine who will be the Republican nominee in 1976. Richard Nixon, for example, won nomination in 1968 by only 51.9 percent of the vote, receiving 692 ballots, just 25 more than the 667 needed for a majority. A different apportionment fairly reflecting the interests of Republicans in every state would clearly have altered the deliberations of that gathering and could have resulted in the nomination of a different Republican candidate in 1968.[1] Because of the large number and potentially great influence of these bonus delegates in determining who will receive one of the two major presidential nominations, the rule by which such delegates are allocated to the states must be subjected to close constitutional scrutiny.

**Convention Domination by the Beneficiaries of the Malapportionment**

As this Court has noted frequently in the context of the legislative districting cases, one of the most pernicious effects of malapportionment is to permit the entrenchment in the malapportioned body of those persons and interests who benefit from the misallocation. The territorial dis-

[1] To take one representative example, if the 1968 Convention had been apportioned in accordance with Electoral College strength, and each state's delegates had voted in proportion to the actual 1968 convention vote of that state, Nixon would have received only 650 votes on the first ballot, 17 less than the number necessary for nomination.

crimination of the GOP's victory bonus has in fact provided a ready mechanism for the self-perpetuation of those groups that now prevail within the Republican Party—prevail at the cost of denying to all other Party members the fair and equal starting place in the political process that is guaranteed to them by the Constitution. To quote from the vacated opinion filed by a division of the Court of Appeals on March 5, 1975:

> "The right to an equal vote serves to prevent an entrenchment of any one group of interests to the exclusion of others even if freely chosen in the most democratic fashion, [footnote omitted] because such an entrenchment in the very process of political choice is contrary to the democratic ideal. In each election, warring interest groups must theoretically re-contest the balance struck at the last election. In this manner, democratic change is permitted if such change is desired." Pages 43-44 of the Appendix to the Ripon Society's Petition for a Writ of Certiorari, herein cited as *App.* ——.

Each Republican convention adopts the formula for apportioning delegates to the next convention, and control over future apportionment thus rests solely with the membership of the body whose representative legitimacy is under attack. In 1976, 50 percent of the delegates will come from states that have only 45.9 percent of the Electoral College vote and 38.9 percent of the population, and which cast just 38.6 percent of the Republican presidential vote in 1972. The eight most populous states, on the other hand, will be alloted only 39.1 percent of the delegates to the 1976 Convention, despite the fact that these states have 42.4 percent of the Electoral College vote and 48.7 percent of the population, and cast 48.6 percent of the 1972 Republican presidential vote. (See Exhibits E and F, *App. 187 and 189.*)

Republicans from the larger states (those most disadvantaged by the present victory bonus), led by delegates

from New York, Pennsylvania, Ohio, Michigan, New Jersey, and Massachusetts, attempted to win approval for a nondiscriminatory apportionment formula at the 1972 Convention in Miami Beach. This effort was defeated 434 to 910, however, due in large measure to the opposition of a coalition of small-state delegates from the South and West, who voted nearly unanimously to preserve their favored position.

The underrepresentation of large state Republicans has an effect upon GOP conventions beyond the mere fact of smaller delegations from California, New York, Pennsylvania, Texas, Illinois, Ohio, Michigan, and New Jersey. These populous states are the center of most of the nation's industrial and commercial activities, the focus of urbanization and growth, and the home of the preponderance of blacks, ethnic Americans, and religious minorities. (See the Court of Appeals division opinion, *App. 157.*) Contrary to (a) the principles of fair representation, (b) concern for the GOP's narrowing base of popular support, and (c) the dictates of Rule 32 of the Republican Party's National Rules, which insists on "positive action to achieve the broadest possible participation by everyone in party affairs," successive conventions dominated by small-state, southern and western regional factions have consistently acted to exclude Republicans from the larger states and other areas of the country from meaningful participation in this critical phase of the process by which we elect our Presidents.

**The Irrationality of the Present Allocation Plan**

The *en banc* majority devoted considerable attention to "justifications of the challenged formula" in an attempt to discover a rational basis for the victory bonus system adopted by the 1972 Convention. *App. 102-105.* This attempt was unsuccessful. As Chief Judge Bazelon remarked: "The justifications, if they may be so named,

the court offers in support of the malapportionment of the Republican convention are the sort easily made and quickly forgotten." *App. 155*, Bazelon, C.J., *dissenting; citing* the division's *slip op.* at pp. 30-37.

The Court of Appeals majority below acknowledges that the victory bonus system "could stand some improvement, of course." It nevertheless defends the present allocation plan on the ground that it is not unreasonable (1) that party politics should be oriented toward keeping in the Republican camp those states which have previously voted for GOP presidential nominees, and (2) that the victory bonus may provide these "Republican" states with a reward and an incentive for the good work of their respective state party organizations. *App. 103*. Experience in the realities of national politics reveals that neither of these rationales (nor any of the others advanced by the Republican National Committee and evidently discarded by the *en banc* majority) is sustainable.

The assertion that a "state which has gone Republican in the past may do so again," ignores the fact that it just as likely may not. *App. 103*. Of the 26 states carried by the Republican nominee in 1960, only one was carried in 1964. Of the six states in which the GOP candidate won a majority in 1964, only two voted Republican in 1968. Of the 44 states that were not carried by the GOP nominee in 1964, only 14 were not carried in 1968. Of the states which carried for the Republican nominee in 1968, all did so again in 1972, but so did all but one of the 18 states where the same Republican candidate lost in 1968. The import of these political facts is clear. Any victory bonus that is based upon success only in the single, immediately preceding presidential election and fails to take into account the margin of victory or defeat in that election, will have little value in predicting future party success. *See*, "Developments in the Law-Elections," 88 *Harv. L. Rev.* 1111, 1200 (1975).

As for the Court of Appeals' second rationale, that the present victory bonus may offer an incentive to state parties to strengthen their organizations and improve their performance, this explanation is highly speculative and in our experience simply has no basis in fact. To begin with, the bonus system is at best superfluous. A strong party organization and a winning presidential candidate will tend to produce party victories throughout the ticket. It is thus difficult to believe that state and local organizations will refrain from attempting to maximize party strength merely because they will not be entitled to an award of extra votes at the National Convention to be held four years later. What is more, allocating the votes according to past presidential pluralities may result in bonuses to states that already have healthy party organizations, while withholding bonuses from those states which did not carry for the GOP nominee in the preceding election but could produce victories in the future by recruiting only a few additional adherents. *See*, "Developments in the Law-Elections," 88 *Harv. L. Rev.* 1111, 1199 (1975).

The victory bonus system as it is now embodied in Rule 30 serves no rational purpose that we have been able to discern. Certainly, the apologies offered by the Court of Appeals majority and the Republican National Committee are inadequate to justify the gross deviation from the one person-one vote and modified proportionality standards that under the Constitution must govern every stage of the presidential election process.

**The Need for a Definitive Judicial Ruling**

The constitutional guidelines within which a victory bonus system may be framed, and the subject of delegate apportionment generally, have been heatedly debated at recent Republican conventions. Yet throughout these debates neither the supporters nor the opponents of the

various allocation plans have been able with any confidence to appraise the legality of the competing alternatives. And the unsteady course of the present litigation during the past five years has done little to clarify the judicial standards applicable to this phase of electoral democracy. The order of Mr. Justice Rehnquist one week before the 1972 Convention stayed the District Court's order enjoining the use of a uniform victory bonus. This stay, followed by the Ripon Society victories in the District Court in January 1974 and in the Court of Appeals in March 1975, and the rehearing *en banc* ending in reversal of the District Court decision, has left conscientious party officials—not to mention the law—in a state of confusion.[2] The matters in controversy here are not only capable of repetition (as that term is used in the mootness cases), but absent a decision from this Court are almost certain to be relitigated in anticipation of the 1980 Convention. It is therefore plainly in the interests of all parties concerned that the Supreme Court act now to review conclusively these important issues of public policy.

For more than 40 years the Republican Party's delegate apportionment formula has included a victory bonus system designed with little regard to constitutional values. Unless an opinion is rendered by this Court, this pattern will be repeated in 1976. The delegates from those small-state, regional factions that (because of the inequities of the present formula) will undoubtedly enjoy majority control of the 1976 Convention can be expected to adopt a similarly objectionable plan for 1980—i.e., a plan that in addition to returning them or their successors to the next convention will further hinder Re-

[2] This is particularly true because of the *en banc* Court's unwillingness to resolve the threshold issues of state action and justiciability, which places in question but does not decide whether further recourse to the judiciary on these matters will even be permitted. *See* the concurring opinions of Judges Tamm and Wilkey, and the dissenting opinion of Senior Judge Danaher, *App. 109*, *127*, and *159*, respectively.

publican efforts to appeal to a broad national constituency.

In any event, delegate apportionment is sure to be a major issue at the 1976 Convention, and without a definitive resolution of the constitutional questions raised in this litigation, the delegates and the Republican voters who elected them will be denied an opportunity to develop an apportionment formula for 1980 that is demonstrably consonant with a final adjudication by this Court.

## CONCLUSION

As the Court has recognized, the conventions of the two major political parties serve the "pervasive national interest in the selection of candidates for national office." *Cousins* v. *Wigoda*, 419 U.S. 477, 490 (1975). And the paramount necessity for fair and effective performance of the tasks of these conventions is underscored by Mr. Justice Pitney's reminder that:

> "[T]he likelihood of a candidate succeeding in an election without a party nomination is practically negligible . . . . As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made." *Newberry* v. *United States*, 256 U.S. 232, 286 (1921) (Pitney, J., dissenting).

The major political parties and their national conventions are an integral part of the electoral process. To deprive certain Republican voters of the full representation at these important gatherings to which they are constitutionally entitled is thus to impair significantly their exercise of the franchise. Such a result is condoned and given new life by the opinion of the *en banc* Court of Appeals majority. But the Appellate Court's untenable ruling cannot be allowed to stand as the final judicial word on this subject. The Supreme Court should instead

grant the petition of the Ripon Society for a writ of *certiorari* so that this matter may receive from the highest tribunal the thorough constitutional analysis it properly deserves.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-884

THE RIPON SOCIETY, INC., et al.,
*Petitioners,*

v.

NATIONAL REPUBLICAN PARTY AND
REPUBLICAN NATIONAL COMMITTEE,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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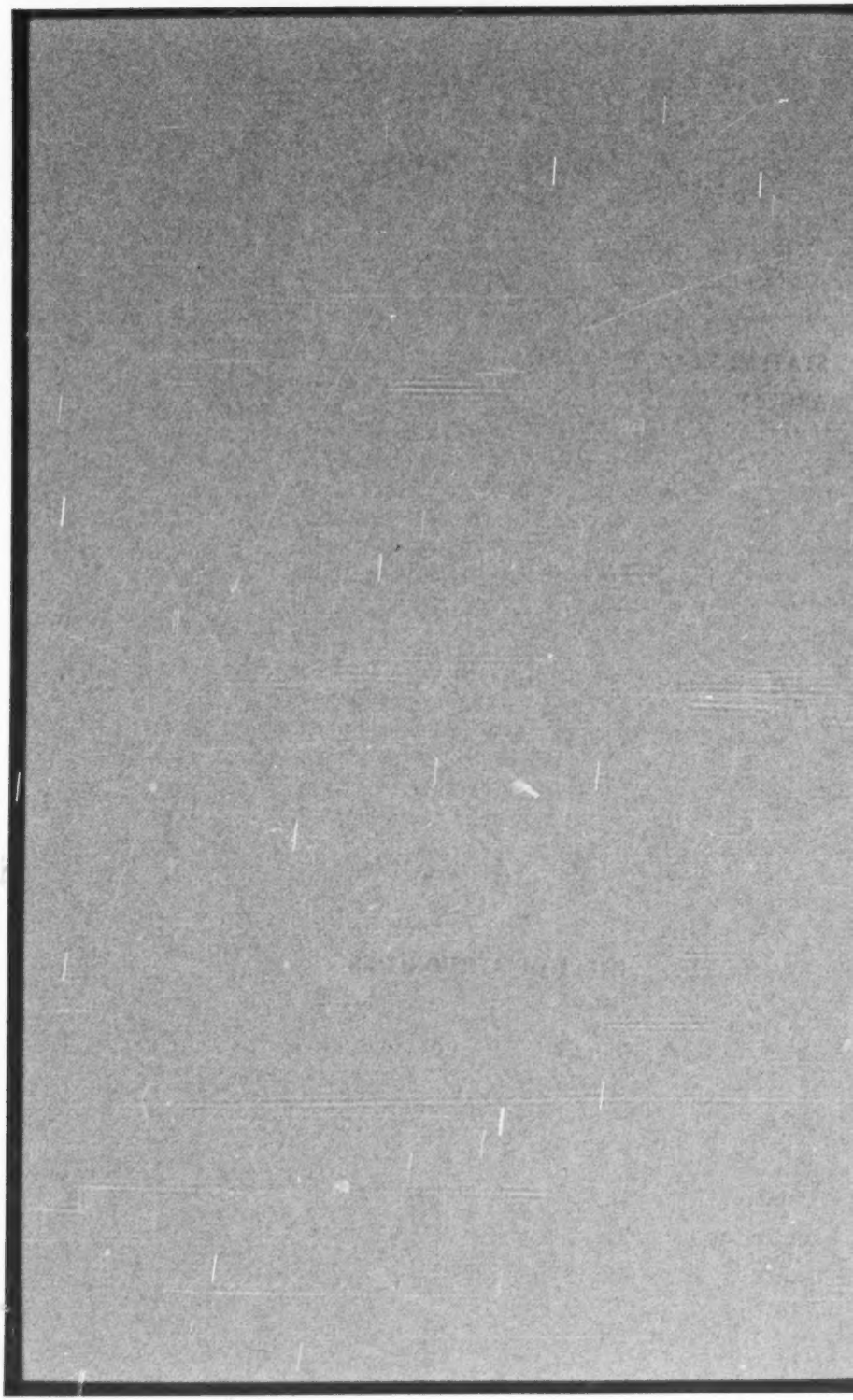

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, is not yet reported but is reproduced in the Appendix to the Petition at 68.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that a political party's apportionment of delegates to national party nominating conventions represents an exercise of the constitutional right of free association and that the apportionment formula for the 1976 Republican National Convention, which the Court of Appeals found was rationally related to a legitimate political interest of the Republican Party, was a valid exercise of that right of free association.

2. Whether the Petition presents a request for an advisory opinion on a moot question, since the petition concedes that relief cannot now be granted in time to affect delegate allocation for the 1976 Republican National Convention.

## STATEMENT OF THE CASE

Petitioners are the Ripon Society, Inc. and nine individual members of that Society. Respondents are the Republican National Committee and the National Republican Party.

Petitioners commenced this action by filing their original complaint in District Court for the District of Columbia on November 8, 1971. That complaint challenged the constitutionality of the delegate alloca-

tion formula adopted at the 1968 Republican National Convention for the allocation of delegates to the 1972 Convention (1968 Formula). On April 28, 1972, the District Court issued an order and opinion granting, in part, petitioners' motion for summary judgment. Both parties appealed this ruling to the Court of Appeals. After the Court of Appeals denied respondents' motion for a stay pending appeal, Justice Rehnquist issued an order staying the District Court's judgment. *Republican State Central Committee of Arizona v. Ripon Society Inc.*, 409 U.S. 1222.

The 1972 Republican National Convention, by a vote of 910 to 434, adopted Rule No. 30 to govern the apportionment of delegates to the 1976 Convention. Rule No. 30 is reproduced at pages 4-5 of the Appendix to the Petition (hereinafter *App.* ____). Under the 1976 apportionment formula, the bulk of the delegates are allocated among the states on the basis of three delegates for each Electoral College vote. Rule No. 30 apportions most of the remaining delegates on the basis of the victory bonus provisions challenged by the petitioners. The Presidential victory bonus provision allocates delegates as follows:

> "From each State casting its electoral vote, or a majority thereof, for the Republican Nominee for President in the last preceding election: Four and one-half (4½) Delegates at Large plus the number of the Delegates at Large equal to 60% of the electoral vote from each such State."

In addition, Rule No. 30 provides that one additional delegate shall be awarded to a state for each of the following public officials elected in that state in 1972 or in any election prior to January 1, 1976: (a) a Republican United States Senator; (b) a Republican

Governor; (c) a Republican membership of at least half of the state's delegation to the United States House of Representatives.

After the 1972 National Convention adopted a new delegate allocation formula, thus abandoning the 1968 formula, the Court of Appeals, on November 29, 1972, determined that the litigation was moot and granted leave to petitioners to file a supplemental complaint challenging the 1976 allocation formula. Petitioners filed a supplemental complaint on December 29, 1972, and refiled on April 30, 1973. On January 11, 1974, the District Court granted, in part, Petitioners' Motion for Summary Judgment and issued an order enjoining respondents from adopting a uniform victory bonus provision as part of the delegate allocation formula for the 1976 Republican National Convention (*App.* 17). The District Court's order declared, however, that the 60 percent proportional victory bonus provision of Rule No. 30 "would have a constitutionally rational basis" (*App.* 18). The District Court's opinion is reported at 369 F.Supp. 368 (*App.*

Petitioners and respondents cross-appealed from the District Court's judgment. A division of the Court of Appeals filed an opinion and order on March 5, 1975 (*App.* 19), which was *sua sponte* vacated the same day by an *en banc* order of the Court of Appeals (*App.* 67).

Re-argument was heard before the *en banc* Court of Appeals on May 30, 1975. On September 30, 1975, the Court of Appeals reversed the judgment of the District Court and remanded with directions to dismiss the complaint (*App.* 68). The opinion of the Court by Judge McGowan, in which Judges Wright, Leventhal, Robinson and MacKinnon joined, upheld the delegate allocation formula for the 1976 Republican National

Convention on the basis that it represented a rational exercise of the Party's constitutionally protected right of free association. The Court held that the individual petitioners have standing to sue and that the question of the Ripon Society's alleged standing, while dubious, need not be passed upon. The Court expressly reserved the threshold questions of state action and justiciability[1]

## ARGUMENT

### I.

### THE DECISION OF THE COURT OF APPEALS UPHOLDING THE 1976 DELEGATE ALLOCATION FORMULA AS BEING A RATIONAL EXERCISE OF THE REPUBLICAN PARTY'S CONSTITUTIONAL RIGHT OF FREE ASSOCIATION IS CORRECT IN THE LIGHT OF RECENT DECISIONS OF THIS COURT.

Central to the decision of the Court of Appeals is the principle that in making the essentially political

[1] Judge MacKinnon filed a concurring opinion in which he stated his view that the Ripon Society lacks standing (*App.* 108). Judge Tamm, joined by Judge Robb, filed an opinion concurring in the majority result but on the ground that the requisite state action had not been demonstrated and that the issues were nonjusticiable (*App.* 109, 172). Judge Wilkey filed an opinion concurring in the majority result on the basis of the state action and justiciability issues (*App.* 127). Chief Judge Bazelon, who had written the division's opinion, dissented (*App.* 148). Judge Danaher also filed an opinion (*App.* 159) in which he dissented from the majority's holding on the ground that lack of state action and nonjusticiability precluded a decision on the merits.

decisions of how to structure and apportion the membership of national nominating conventions, political parties are exercising their constitutionally protected right of free association. Giving appropriate recognition to the right of free association, the Court of Appeals concluded that the delegate allocation decisions of political parties should be subject only to limited judicial scrutiny. The Court then articulated the following standard for evaluating delegate allocation formulas:

> "We conclude ... that the Equal Protection Clause, assuming it is applicable, does not require the representation in presidential nominating conventions of some defined constituency on a one person, one vote basis. It is satisfied if the representational scheme and each of its elements rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals." (*App.* 101-102).

Since the Court found that the victory bonus provisions of the delegate allocation formula for the 1976 Republican National Convention were rationally related to legitimate political goals of the Republican Party and not invidiously discriminatory, the Court further held that those provisions were protected by the right of free association, saying:

> "... the formula rationally advances legitimate party interests in political effectiveness... There are no racial or other invidious classifications here." (*App.* 105-06)

There is no conflict of decisions among the various courts of appeal on this question. There are decisions on various other questions in the lower courts as recounted in the petition, none of which raise the issues

presented here. Those cases, almost without exception, involve allocation formulas applicable to the direct election of state officials. No cases are cited, indeed no case exists, where any Federal Court acting under any constitutional basis has ordered a national political party to implement or to cease from implementing any particular delegate allocation formula for a national convention. The Court below refused the invitation, saying:

> "What is important for our purposes is that a party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserve the *protection* of the Constitution as much if not more than its condemnation. . . If that is so, there must be a right not only to form political associations but to organize and direct them in the way that will make them most effective. (Emphasis in original). (*App.* 99):

In subjecting political party decisions regarding delegate allocation to limited scrutiny, the Court was guided by recent decisions of this Court. In *O'Brien v. Brown*, 409 U.S. 1, this Court stayed rulings of the Court of Appeals on the constitutionality of certain recommendations made by the Democratic Credentials Committee to the 1972 Democratic National Convention with respect to seating of delegations from Illinois and California. The Court of Appeals' ruling would have limited the convention's discretion relating to delegate challenges and this Court, in issuing its Stay Order, reasoned (p. 4):

> No case is cited to us in which any federal court has undertaken to interject itself into the deliberative processes of a national political convention; no holding of this Court up to now gives support for

judicial intervention in the circumstances presented here, involving as they do, *relationships of great delicacy that are essentially political in nature*. Cf. Luther v. Borden, 7 How. 1 (1849). Judicial intervention in this area traditionally has been approached with great caution and restraint. See Irish v. Democratic-Farmer-Labor Party of Minnesota, 399 F.2d 119 (CA8 1968), affirming 287 F.Supp. 794 (Minn. 1968) and cases cited; Lynch v. Torquato, 343 F.2d 370 (CA3 1965); Smith v. State Exec. Comm. of Dem. Party of Ga., 288 F.Supp. 371 NDGa. 1968). Cf. Ray v. Blair, 343 U.S. 214 (1952). It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated. Thus, *these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties. Highly important questions are presented concerning justiciability*, whether the action of the Credentials Committee is state action, and if so the reach of the Due Process Clause in this unique context. *Vital rights of association guaranteed by the Constitution are also involved.* (Emphasis supplied.)

In *Cousins v. Wigoda*, 419 U.S. 477, the Court struck down an injunction issued by an Illinois state court against the seating of certain delegates from Illinois at the 1972 Democratic National Convention. The Court held that Illinois had not demonstrated a compelling state interest "to justify the injunction's abridgement of the exercise by petitioners and the National Democratic Party of their constitutionally protected rights of association." (*Id.* at 489) The Court summarized the right of free association of political parties in the following passage (*Id.* at 487-88):

> The National Democratic Party and its adherents enjoy a constitutionally protected right of political association. "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." Kusper v. Pontikes, 404 U.S. 51, 56-57 (1973) . . . Moreover, "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); see NAACP v. Button, 371 U.S. 415, 431 (1963).

The Court of Appeals was thus following the guidance provided by *O'Brien v. Brown* and *Cousins v. Wigoda* when it upheld the Republican Party's delegate apportionment decisions on the basis of the Party's right of free association.

Central to a party's exercise of its constitutional right of free association is its right to decide in what manner it can best "achieve the practical advancement of the political ideas for pursuit of which the [party] was formed." *Redfearn v. Delaware Republican State Comm.*, 502 F.2d 1123, 1127-28 (3d Cir. 1974). An integral factor in this decision is the party's determination of what elements of the overall electorate are or would be most receptive to the party's viewpoint and programs, i.e., what the party's "constituency" is or should be. Because the party's "constituency" is not measurable and can only be expressed through the party's own constitutionally protected political judgments, it would be artificial and inappropriate to subject delegate allocation decisions to the basic one

person-one vote standard of *Baker v. Carr*, 369 U.S. 186, and the other reapportionment decisions of this Court. The Court of Appeals clearly acted correctly in declining to apply that standard in the present case.

The finding of the Court of Appeals that the victory bonus provisions of the 1976 delegate apportionment formula are rationally related to a legitimate political interest of the Republican Party can hardly be questioned. In support of this, the Court said:

> As between two states of equal electoral importance, a party could more profitably focus its attention on the one in which it has a chance of victory. This purpose we think is rationally served by the victory bonus system. A state which has gone Republican in the past may do so again. If electoral college apportionment weights the vote of the states according to the value of the prize, the victory bonus system does the same according to the likelihood of winning it.
>
> The victory bonus system may help to keep a state in the Republican camp not only by orienting party policies to that state's interests, but also by providing a reward and incentive for the efforts of that state's party organization. Whether or not it is an effective incentive, it may be the only one that a national party has to offer. In any case, having accepted the legitimacy of such party-strengthening measures, we can hardly say that it is irrational. (*App.* 102-03)

In reaching its decision, the Court of Appeals gave due deference to the interests asserted by petitioners, as reflected in the following passage (*App.* 100-01):

> The First Amendment is of course not our only concern. We are keenly aware that "[a]s a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations

> have been made." If the right to vote is a right to true participation in the elective process, then it is heavily implicated in the nomination process. We do not deny this, but rest our judgment on the view that, as between that right and the right of free political association, the latter is more in need of protection in this case. As is further elaborated below, the right to organize a party in the way that will make it the most effective political organization seems clearly at stake here. The right of one person to one vote is of course preserved in the general election. Theoretically at least, persons dissatisfied with the choice facing them in that election may gain access to the ballot by means other than a major party nomination. They could, of course, form their own party. Of more practical importance is the fact that there are two major parties, which for the time being at least are in intense competition. Persons not heard in one party may be welcomed in the other, and if there are enough such defections, the offending party may lose the general election, as both parties must be well aware. (Footnotes omitted.)

Thus, there is a self-policing mechanism which provides protection against arbitrary actions by the party convention.

The Court recognized that in some instances the balancing of interests reflected in the foregoing quotation might not produce the same result. As the Court stated (*App.* 105-06):

> "To the extent that voting rights are involved, warranting close judicial scrutiny, these rights are offset by the First Amendment rights exercised by the Party in choosing the formula it did. We must emphasize that this is only true because the formula rationally advances legitimate party interests in political effectiveness. The same might

> not always hold true. There are no racial or other invidious classifications here. If there were, the Party's entitlement to constitutional protection would be as slight as those of the victims would be strong. Similarly, we have said that voting rights are not as heavily implicated in a nomination as in an election. It might be otherwise in a case where there is only one party with a realistic chance to win the election, and where a vote in the nominating process is the only effective vote that can be cast. (Footnotes omitted.)

The Court of Appeals carefully balanced the asserted interests of the petitioners against the constitutionally protected right of free association of the Republican Party. Ultimately, the Court followed the guidance of this Court's decisions in *O'Brien v. Brown* and *Cousins v. Wigoda, supra,* in holding that the right of free association protects the party's decisions on allocation of delegates to its 1976 convention. Review of that holding by this Court is not warranted.

## II.

### THE WRIT SHOULD BE DENIED IN ANY EVENT BECAUSE IT IS CONCEDED THAT IT IS NOW TOO LATE TO AFFECT THE 1976 CONVENTION, THUS REDUCING THE PETITION TO A REQUEST FOR AN ADVISORY OPINION ON A MOOT QUESTION.

The Petitioner acknowledges that effective relief from the challenged provisions of the delegate apportionment formula for the 1976 Republican National Convention could not be granted in time for the Convention. The Petition states (at 25-26):

> "If that formula had been finally adjudicated unconstitutional before October 31, 1975, the Republican National Committee would have had authority, under the rules adopted by the 1972 Convention, to effect its revision. Rule 30, Section A.8, *App. 4-5 n.3*. Once the call to the 1976 Convention is issued, now scheduled for year-end 1975, it will not be possible to alter the number of delegates from each state."

Since the Call for the 1976 Convention, fixing the number of delegates for each state, was mailed on December 5, 1975, seventeen days before the Petitioners filed their Application for Writ of Certiorari, effective relief, as petitioners acknowledge, is now foreclosed. The Republican National Committee waited over two months, following the September 30, 1975 decision of the *en banc* panel of the United States Court of Appeals, before sending out the Call.

This Court is not constitutionally empowered to grant Advisory Opinions. That has been the recognized rule since the early days of the Republic, when the Court refused to give an opinion to Thomas Jefferson, Secretary of State, in 1793. See 3 Correspondence and Public Papers of John Jay (1890) 488-489. See also *Muskrat v. United States*, 219 U.S. 346; *North Carolina v. Rice*, 404 U.S. 244, 246; *Trailmobile v. Whirls*, 331 U.S. 40; *Bell v. Maryland*, 378 U.S. 226. It is no answer to say that this will be simply "a declaratory judgment," and thus covered by *Aetna Life Insurance Co. v. Hayworth*, 300 U.S. 227. No one knows what conclusions will be reached at the 1976 convention with respect to the allocation of delegates in 1980, and no real issue can arise with respect to 1980 until that question is determined. It has been said, of course, that an opinion by this Court would be helpful to the 1976

convention in making its decision. That, however, only serves to emphasize the "advisory" nature of such a decision. If the Court is going to venture into this field at all, it should do so only in a concrete case presenting an actual issue arising out of a determination made by the convention. Otherwise, the Court will be taking "general charge of the electoral process."[2]

Finally, it is said that the Court must decide this issue now, since the question is one which is " 'capable of repetition, yet evading review.' " Pet. 26, quoting *Storer v. Brown*, 415 U.S. 724, 737 n.8. But in this case, there are four years remaining before the 1980 convention. If there is complaint about the actions taken by the 1976 convention, there will be adequate time to present the issues in a concrete case before the courts, where the validity of the actual decision made by the 1976 convention can be litigated – not a hypothetical question, as is inevitable now. Moreover, such a case should not take very long to develop in the District of Columbia, since the views of the Court of Appeals here were made clear by the decision below.

Finally, it may be observed that that decision was rendered on September 30, 1975. The panel decision had been issued on March 5, 1975. At no time did the Petitioner seek review from this Court before judgment in the Court below, as is authorized by 28 U.S.C. 2101. Moreover, even after the en banc decision was rendered on September 30, 1975, the Petitioners waited nearly all of the ninety days following that date before they filed their petition, on December 22, 1975, at which time the Call to the convention had already been

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[2]The phrase comes from Lusky, "By What Right?" (1975) p. 144.

mailed. The Respondents have never sought to delay this case.

## CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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